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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 755

J. ROB GRIFFIN, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ROBERT D. GORDON, DECEASED, PETITIONER,

vs.

JOHN D. McCOACH, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1941.

CERTIORARI GRANTED MARCH 17, 1941.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1941.

—3332

CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court for the Northern District of Texas, begun and holden a Dallas, Texas, on the 8th day of January, A. D. 1940, and which said term adjourned on the 23rd day of March, A. D. 1940, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, presiding, the Following proceedings were had and the following cause came on for trial and was tried, to-wit:

No. 88 Civil Action.

J. ROB GRIFFIN, Administrator with Will Annexed of the Estate of Robert D. Gordon, Deceased,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL.

AGREED STATEMENT UNDER RULE 76 RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES.

2 Filed August 1, 1940.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

J. Rob Griffin, Administrator with Will Annexed, of the Estate of Robert D. Gordon, deceased, Substitute Plaintiff,

vs. Civil Action No. 88.

The Prudential Insurance Company of America, et al., Defendants.

(1) This suit was instituted by Mrs. Fannie V. Gordon (widow of Robert D. Gordon) individually and as next

friend of her two minor children, against the Prudential Insurance Company of America, on a life insurance policy issued on the life of Colonel Robert D. Gordon, in the principal original sum of $50,000.00. The plaintiffs were respectively, the widow and children of the insured, and sued as heirs under Texas law.

(2) The basis of this claim was that the estate of Gordon was entitled to recover the proceeds of the policy, and that the Insurance Company was preparing to pay the money over to certain persons who had no insurable interest.

(3) The Prudential Insurance Company answered by a Bill of Interpleader, which was allowed. The Insurance Company tendered the sum of $37,462.11 into the Registry of the Court, and was allowed a fee for answering and was discharged with its costs. An interlocutory judgment was rendered against one of the claimants, Mrs. Gretchen McCoy Gordon, an ex-wife of the insured; and the other defendants to the Bill of Interpleader, John D. McCoach, Trustee, John D. McCoach, Max I. Brenwasser, George B. Cody, Nathan Schweiger, Alfred D. Leonard, Frederick W. Mead and Julius A. Bates, answered and claimed the proceeds of the policy, asking that said proceeds be adjudged in favor of John D. McCoach, Trusteee.

3 (4) Subsequently, J. Rob Griffin was appointed administrator with the will annexed, of the estate of Gordon, and was substituted in the cause as plaintiff.

(5) Mrs. Gordon then intervened on her own behalf, claiming a one-eighth (1/8) of the proceeds of the policy by a contract with the other defendants.

(6) The material and relevant facts in the case are as follows: In the year 1922 the last named defendants, here-

inafter referred to as "members," formed in the State of New York a common law association called the "Middletown Tex Oil Syndicate." This syndicate purchased oil and gas leasehold interests in certain leases being developed by Gordon.

(7) Gordon took out a term insurance policy for $50,000.00 in the Prudential Insurance Company, convertible to a whole life policy at the end of seven years, and named the Middletown Tex Oil Syndicate as the beneficiary. Prior to the formation of the syndicate some of the members had loaned money to Gordon, as well as invested in his oil enterprises in the State of Texas. The syndicate ceased operations as such approximately two years after the policy had been issued. The application for the policy was signed by Gordon in the State of New York, and forwarded to the home office of the Prudential Insurance Insurance Company in the State of New Jersey, and there acted upon, and the policy was delivered in the State of New York. Prior to the issuing of the policy and thereafter, the members advanced considerable money to Gordon, and the premiums on the policy were paid by the members of the syndicate at Gordon's request, upon his agreement to repay the syndicate. Premiums were paid on the policy by the syndicate, in accordance with this agreement and were never repaid by Gordon.

(8) In the year 1924 the Middletown Tex Oil Company ceased to do business, due to financial reverses. The seven members of that syndicate formed a new association called the "Protection Syndicate," with written articles of association which are attached as Exhibit "A".

4 (9) The members, with the consent of Gordon, then procured a change of beneficiary, naming themselves as beneficiaries of the policy. Thereafter the Protection Syndicate, operating under its articles of asso-

ciation, continued to pay the premiums upon the term policy until the expiration of the term. Loans and advancements were made by the members to Gordon after the formation of the syndicate, which Gordon promised to repay. No loan or advancement was ever repaid by Gordon.

(10) One of the beneficiaries, Nathan Schweiger, was likewise a soliciting agent for the Prudential in Middletown, N. Y. The syndicate obtained the consent of Gordon, and he applied to convert the $50,000.00 term policy into a $50,000.00 whole life policy, as he had the right to do under the provisions of the term policy, copies of these policies being lettered respectively "B" and "C", and attached hereto as exhibits. The form of the new policy was not in existence at the time of the issuance of the term policy, but was a new form originated by the Prudential Insurance Company after the term policy had been issued. The necessary papers for effecting this change were executed by Gordon in the State of New York, and from there forwarded to the Home Office of the Company in New Jersey, and from there delivered to the beneficiaries in New York, and the syndicate paid the premiums on the new policy as it had upon the old, except a quarterly premium of $260.00 which was paid by Gordon. In both of the policies the right to change the beneficiary was at all times, by the terms of the policy, in Gordon, the insured, upon written application and surrendered of the policy to the company for indorsement. The policy was at all times in the possession of one of the seven men in New York state.

(11) In the year 1932 Gordon wrote the Insurance Company that he desired to change the beneficiary of the policy to his wife, Mrs. Fannie V. Gordon. The policy had remained in the possession of the syndicate, and they were

acquainted with this request both by Gordon and the Prudential. No change was made at this time. At the time the original policy had been issued, and at all times subsequent, Gordon had been a citizen and inhabitant of the State of Texas, and at the time mentioned he
5 was a resident of Tyler, Smith County, Texas. Subsequently, Colonel Gordon, in September 1934, and the syndicate entered into negotiations with reference to the surrender of his rights in the policy to the beneficiaries.

(12) Gordon proposed to give up his rights to the policy for a certain amount of cash. The members refused this offer. During the negotiations the members of the syndicate in New York, at a meeting of the Association, commissioned Schweiger to offer Colonel Gordon a counter proposition substantially as follows: That the syndicate would pay to Gordon one-eighth of the proceeds of the policy received during his lifetime, and one-eighth of the proceeds to his wife at his death, if Gordon would relinquish his right to change the beneficiary and to receive the disability payments and all other rights under the policy, to the beneficiaries. This offer was communicated through the United States mail by letter posted in Middletown, N. Y., and received by Gordon in Tyler, Texas. About the same time this communication was sent to Gordon, inquiry was made by mail of the home office of the Prudential at Newark, N. J., as to whether it would consent to the arrangement, and if so, what forms would be required.

(13) The Prudential Insurance Company advised the Syndicate as follows:

November 1, 1934.

Pol. 3913426 Gordon.
Yours of Oct. 20.

Mr. J. R. Quigley, Supt.,
Middletown, N. Y.

Attention: Agent N. Schweiger.

Dear Sir:

We have carefully reviewed the papers which we have on file and have again noted the questions raised in Agent N. Schweiger's letter of October 5 regarding a change of beneficiary and the insertion of an Extension of Rights Clause in this policy, and we have taken the matter up with our Law Department. After careful consideration it has been decided that we would be willing to
6 make a change of beneficiary to John D. McCoach as trustee beneficiary and insert our so-called Extension of Rights Clause in the policy in his favor, thus placing the contract under his absolute control. We are enclosing amendments providing for this arrangement. Both forms should be signed by the insured, and as evidence of the approval of the Protection Syndicate of those changes, all the members of the syndicate should also sign the forms. All signatures should be properly witnessed, and the papers should then be returned to this Department, together with the policy for indorsement.

If the policy is indorsed with the enclosed amendments and it becomes a valid claim by the death of the insured payment in the natural course of business will be made to John D. McCoach as trustee. The policy will also be controlled by John D. McCoach as trustee, and if he predeceases the insured a successor trustee could be appointed by the Court having jurisdiction in the premises.

Yours truly,

(S.) J. C. WATERS,
Mathematician.

(14) In the meantime, Colonel Gordon had accepted the proposal of the beneficiaries theretofore transmitted to him by Schweiger by letter posted in Tyler, Texas, and received by Schweiger in New York.

(15) During the course of these negotiations Gordon acquainted the members of the syndicate with the fact that he was suffering from hyper-tension and other ailments which he felt had rendered him totally and permanently disabled, and entitled him to the disability payments under the terms of the policy, and that he had had himself examined by the United States government physician for the purpose of making a claim under his war risk policy.

(16) After the receipt of the forms, Exhibits "D" and "E", furnished by the Prudential, Schweiger transmitted them from Middletown, N. Y. to Tyler, Texas, for Colonel Gordon's signature. They were there executed by Colonel Gordon before a notary public in Tyler, Texas, and returned to Middletown, N. Y., where they were executed by the parties residing there, from whence they were sent by Schweiger, with the policy, to the home office at Newark, N. J., and subsequently the forms were indorsed on the policy and it was returned directly from New Jersey to the beneficiaries in New York.

7 (17) By this last change of beneficiary (which was made in this form at the suggestion of the Insurance Company) the beneficiary was made John D. McCoach, Trustee, who was trustee for the benefit of the former beneficiaries.

(18) Thereafter, three of the original members of the syndicate assigned their interest in the policy as follows:

Max I. Brenwasser on June 6, 1935, to Harry G. Nelson, in consideration of the payment of $500.00 to Brenwasser;

Julius A. Bates, on June 24, 1936, to George E. Bradnack, in payment for a debt, the amount of which he did not state, and with the further agreement on the part of the assignee to pay Bates $500.00, if, as and when Bradnack received payment under the policy; (to the extent of Bates' $500.00 retained interest this assignment is not questioned, but only the part claimed by Bradnack);

Alfred D. Leonard, on November 20, 1934, to his son, LeRoy E. Leonard. There was no monetary consideration for this assignment, but it was made because Alfred D. Leonard was unable to continue to pay his share of the premiums on the policy.

(19) After these assignments were made, the assignees paid their pro rata share of the premiums—in the case of Nelson $235.28; in the case of Brenwasser $235.28; in the case of LeRoy Leonard $599.71—until Colonel Gordon became totally and permanently disabled, and proof of that fact was furnished to the Prudential Life Insurance Company by Gordon, whereupon, pursuant to the provisions of the contract, the company waived further payment of premiums, and began payment of the disability benefit of $500.00 per month, which payments continued until the death of Colonel Gordon, April 17, 1939.

(20) The assignees Nelson, Bradnack and Leonard received out of these payments the sum of $1,629.07 each.

(21) The procedure by which these payments were made was that the $500.00 per month was paid to John D. McCoach, Trustee, and that he paid one-eighth of that sum to each of the four original members of the syndicate, and one-eighth to each of the assignees mentioned, and one-eighth to Colonel Gordon. Under this policy, the amount

of disability payments was deductible from the face amount of the policy, $50,000.00, and there remained due on the policy the sum of $37,462.11, which was tendered into the Court by the Insurance Company.

(22) The original members of the syndicate and the assignees prayed that judgment be rendered in favor of John D. McCoach, as trustee for them, and it is agreed that McCoach having recovered judgment as trustee intends to pay over the funds to the assignees to the extent of their one-eighth interest each.

(23) The lower Court found from the evidence that each of the original members of the syndicate had made loans and advancements to Gordon in excess of the amount of the disability payments which they had received, and in excess of the amount of their respective shares of one-eighth each out of the funds in the Registry of the Court.

(24) But as to the assignees of the original members of the syndicate, it is stipulated that none of the assignees of interest in the policy knew Colonel Gordon, nor ever made any loans or advancements to him, and in fact never had any business dealings with him (except payment of premiums on the policy) and the assignments executed by Bates to Bradnack, and Brenwasser to Nelson, are identical to a copy of the latter, attached hereto as Exhibit "F". No formal assignment was made by the elder Leonard to LeRoy E. Leonard. It is likewise undisputed that none of the assignees were related to Gordon by blood or marriage.

(25) The findings of the lower Court are attached as Exhibit "G", and are not disputed as to the facts, except that appellant contends that Gordon's Texas acts make the changed policy to McCoach Trustee a Texas contract.

(26) It is agreed that the original owners of the assigned interest had an insurable interest in the life of the insured by virtue of loans and advancements.

(27) The original members of the syndicate at the time they assigned their interest in the policy, were acquainted with the probability that Gordon would shortly have to apply for disability benefits under the policy.

9 (28) A copy of the final judgment marked Exhibit "H", a copy of the notice of appeal filed June 13, 1940, marked Exhibit "I", and a copy of the order enlarging the time for filing this record, marked Exhibit "J", are attached.

(29) This appeal involves only the correctness of the judgment of the trial Court concerning the persons entitled to receive the assigned interests hereinabove referred to.

The Plaintiff's contention on this appeal are:

I. That the trustee McCoach claimed as beneficiary under a Texas contract, and that his assignment and change of beneficiary was governed by the law of Texas, and as incident thereto, McCoach as trustee could only claim in that capacity for persons having an insurable interest under the law of Texas; and inasmuch as the assignees had no such interest under Texas law, McCoach was not entitled to recover in their behalf.

II. That even if the contract whereby Gordon relinquished his claim in return for a one-eighth interest in the policy to himself and at his death to his wife, be construed to be governed by the law of a state other than Texas, that the Court in which the Bill of Interpleader was filed, sitting in the State of Texas, even though a United

States Court, was bound by the public policy of the commonwealth in which it sat, and could not apply a different rule than would be applied in a State Court of concurrent jurisdiction; that the public policy of Texas inhibits the collection of proceeds of insurance policies by persons having no insurable interest, except as trustee for the estate or heirs, and that this public policy intervened and required a judgment against McCoach for the benefit of the three assignees of members of the syndicate. Hence the plaintiff as administrator, was entitled to recover, inasmuch as he represented the estate and the assignees claimed in their proper person, and not as trustees for the estate.

III. The facts show that the assignees, at the time they acquired the interest of the original members in the policy, paid a consideration out of proportion to the interest which they purchased in the policy, under circumstances which show that they were necessarily more interested in the death of the insured than in his continued existence; and in effect their participation in the syndicate amounted to nothing save a gambling transaction.

The foregoing stipulation of the parties having been agreed upon by the respective attorneys of record under the provisions of rule 76, is this day signed and presented to the Judge who tried the case for his approval.

JOS. W. BAILEY, JR.,
C. J. SHAEFFER,
Attorneys for J. Rob Griffin, Administrator,
CARL B. CALLAWAY,
FRANK C. BROOKS,
Attorneys for Cross-Defendants.

ORDER OF APPROVAL.

The foregoing stipulation, with its Exhibits, have been presented to the Court, duly approved by opposing counsel, is found to conform to the truth. And the Court further finds that no additions are necessary to fully present the questions raised by the appeal, and the stipulation is hereby approved; including the photostatic copy and the policy, the Clerk is directed to certify it as the record on appeal.

Done at Dallas, Texas, this the 1st day of August, A. D. 1940.

WM. H. ATWELL,
U. S. Dist. Judge.

11 EXHIBIT A.

Copy.

Protection Syndicate.
Middletown, N. Y.

Articles of Association.

We, the undersigned, residents of Middletown, N. Y., do hereby associate ourselves together under the name and title of the Protection Syndicate which is organized for the sole purpose of paying the Premiums on a Life Insurance Policy No. 3913426, dated March 29th, 1922, for $50,000.00, issued by the Prudential Insurance Company to Robert D. Gordon and to receive the compensation due in case of his death.

We all and severally agree and do hereby pledge ourselves to pay into this Syndicate our prorata share of all premiums that may become due upon the said policy and

we further agree that whatever sum shall be paid upon the said policy by the Prudential Insurance Company shall be divided pro rata among the seven members of this Syndicate, their administrators, executors or assigns.

It is further agreed that if at any time during the life of the said policy that if any of the syndicate members shall be unable to pay their pro rata premiums or shall withdraw from the Syndicate that the remaining members may keep the premiums paid up, and in such case it is provided that whenever the $50,000.00 insurance is paid that such sums as have been paid by the said withdrawal or suspended members as pro rata premiums shall be refunded to such withdrawal or suspended members, their administrators, executors or assigns and the excess or profit, if any, shall belong to the members then in good standing.

And we further designate and appoint John D. McCoach to serve as Secretary and Trustee of this Syndicate, with full authority to pay all maturing premiums on said policy and to receive and distribute all monies that may be paid upon the aforesaid policy and to sign all notes, receipts or obligations for the Syndicate, and he shall serve for such term or terms and be subject to the order of the majority of the subscribers.

In witness whereof we have this 28th day of March, 1924, set our hands and seals.

(Signed):

MAX I. BRENWASSER, (L. S.)
JULIUS A. BATES, (L. S.)
FREDERICK W. MEAD, (L. S.)
JOHN D. McCOACH, (L. S.)
GEORGE B. CODY, (L. S.)
NATHN SCHWEIGER, (L. S.)
ALFRED D. LEONARD. (.....)

Witness:
(S.) J. C. DEWA....

12 EXHIBIT D.

Copy.

Prudential Insurance Company of America,

Incorporated under the Laws of the State of New Jersey.

Edward D. Duffield, Presdt.

Request for Amendment of Ordinary Policy Contract.

Ordinary Policy Department.

October 30th, 1934.

The Prudential Insurance Company of America is hereby authorized and requested to amend contract for insurance on the life of Robert D. Gordon, under policy No. 3913426, issued the 29th day of March, 1922, as follows:

Indorse the following clause on the Policy:

Change of Beneficiary.

At the request of the insured and ..... dated October 30, 1934, it is specially agreed that if this Policy shall become a claim by the death of the Insured the amount of insurance then payable on accordance with the terms of the Policy shall be payable as follows, and not as heretofore provided:

To John D. McCoach, Trustee, Beneficiary.

It is further agreed that the Prudential Insurance Company of America shall not be responsible for any act or omission of said Beneficiary as Trustee, and that payment to said Beneficiary shall fully discharge said The Pru-

dential Insurance Company of America from any and all liability whatsoever under this policy, and said last mentioned Company may assume that said Beneficiary is acting and continues to act as Trustee until valid notice in writing to the contrary is given to said The Prudential Insurance Company of America at its Home Office in Newark, New Jersey.

If the above Policy has been assigned prior to this change of Beneficiary, such change is made subject to all rights created by such assignment.

And in consideration thereof, it is hereby agreed that these charges shall be an amendment to and form a part of the original application and Policy. It is also agreed that this amendment shall not be operative until the Policy shall have been indorsed or rewritten in accordance herewith by the Company.

Each person executing this form represents The Prudential Insurance Company of America that he (or she) has attained majority according to the laws of the State (or Province) in which he (or she) resides, or that he (or she) is empowered by law to execute this form even though majority has not been attained.

(S.) ROBERT D. GORDON.
(Signature of Insured),
(District) Middletown.

Witness:
(S) LINDA MARTIN.

What Agent adjusted change:
(S.) J. R. QUIGLEY, Supt.

13 State of Texas,
County of Smith.

Before me, the undersigned authority, on this day personally appeared Robert D. Gordon, who certified that he executed the foregoing of his own free will and for the consideration herein mentioned.

(S.) LINDA MARTIN,
Notary Public in and for Smith County, Texas.

My Commission expires June 1st, 1935.

(Date) November 20, 1934.

Protection Syndicate:
JOHN D. McCOACH,
MAX I. BRENWASSER,
NATHAN SCHWEIGER,
GEORGE B. CODY,
ALFRED D. LEONARD,
FREDERICK W. MEAD,
JULIUS A. BATES.

Witness:
J. R. QUIGLEY, Supt.

14 EXHIBIT E.

Prudential Insurance Company of America.

Home Office, Newark, N. J.

Incorporated under the Laws of the State of New Jersey.

Edward D. Duffield, Presdt.

Request for Amendment of Ordinary Policy Contract.

Ordinary Policy Contract.

October 30, 1934.

The Prudential Insurance Company of America is hereby authorized and requested to amend contract for insur-

ance on the life of Robert D. Gordon, under policy No. 3913426, issued the 29th day of March, 1922, as follows:

Provisions as to Rights, Benefits and Advantages under the Policy.

All rights, benefits and advantages specifically given to the Insured by the terms of this Policy of which, except for the provisions of this Rider, might be exercised by the Insured, shall belong to and may be exercised by John D. McCoach, Trustee, or his successor in the trust, instead of the insured. Any and every exercise of such rights involving a change in the manner of payment of the proceeds of this Policy or a change of the Beneficiary or Beneficiaries to whom such proceeds shall be payable or a transfer of all of the rights, benefits and advantages hereby conferred to any other person, firm or corporation, shall be subject to the rights of any previous assignee of this Policy, shall be bu written notice to the Company at its Home Office in Newark, New Jersey, and shall become effective only when an indorsement or rider setting forth such change or transfer is placed on or attached to this Policy by the Company.

It is understood and agreed that:

(a) Anything in this Rider to the contrary notwithstanding, payment of the proceeds of this policy upon the death of the Insured, or, if this be an endowment policy, when the same shall mature either as an endowment or by the death of the insured, shall (subject to the rights of any previous assignee) be made to the person or persons, firm or corporation and in the manner specifically provided on the first page of this Policy, unless otherwise provided by indorsement on or by rider (not including this Rider) attached to this Policy by the Company and in effect when such proceeds become payable;

(b) If the rights, benefits and advantages hereby conferred be hereafter transferred, the exercise of any of such rights, benefits or advantages by the transfer prior to such transfer shall be effective as against the transferee on and after said transfer; and,

(c) That The Prudential Insurance Company of America shall not be responsible for any act or omission of any Trustee referred to above, as Trustee, and that any payment made as provided in this Policy shall fully discharge said The Prudential Insurance Company of America from any and all liability for such payment, and furthermore that said last mentioned Company may assume that the above specifically named Trustee is acting and will continue to act as such until valid notice in writing to the contrary is furnished said last mentioned Company at its Home Office in Newark, New Jersey.

And in consideration thereof, it is hereby agreed that these changes shall be an amendment to and form a part of the original application and Policy. It is also agreed that this amendment shall not be operative until the Policy shall have been indorsed or rewritten in accordance herewith by the Company.

Each person executing this form represents to The Prudential Insurance Company of America that he (or she) has attained to majority according to the laws of the State (or Province) in which he (or she) resides, or that he (or she) is empowered by law to execute this form even though majority has not been attained.

(S.) ROBERT D. GORDON.
(Signature of Insured.)

Witness:
(S.) LINDA MARTIN.

What Agent adjusted change:
(S.) J. R. QUIGLEY.

(Date) Nov. 21/34.

Protection Syndicate:
JOHN D. McCOACH,
MAX I. BRENWASSER,
NATHAN SCHWEIGER,
GEORGE B. CODY,
ALFRED D. LEONARD,
FREDERICK W. MEAD,
JULIUS A. BATES.

Witness:
J. R. QUIGLEY, Supt.

16 EXHIBIT F.

Whereas, a life insurance policy has been issued heretofore to the Protection Syndicate of Middletown, New York, an association of individuals, now consisting of J. D. McCoach, George B. Cody, James A. Bates, Dr. A. D. Leonard, Fred W. Meade, Nathan Schweiger and Max Brenwasser, beneficiaries, on the life of Robert D. Gordon, of Tyler, Texas, in the amount of $50,000, which life insurance policy, #3913426, was issued by the Prudential Insurance Co. of America on March 29th, 1922, and rewritten on the subsequent date of March 30th, 1929, and Whereas, Max Brenwasser is desirous of selling, assigning and transferring all his right, tite and interest to said insurance policy heretofore mentioned to Harry Nelson, of 148½ Linden Avenue, Middletown, New York, for value received, and Whereas, the Protection Syndicate, by its individual members at a meeting duly called for the purpose of acting on the said assignment, has consented for the association and its respective members that Max Brenwasser may sell his re-

spective interest in the said life insurance policy to the said Harry Nelson,

Now, Therefore, I, Max Brenwasser, of Middletown, New York, for and in consideration of the sum of $500.00, receipt whereof is hereby acknowledged, do hereby assign, transfer and set over absolutely unto Harry Nelson, all my right, title and interest in the aforesaid life insurance policy and all benefit and advantage to be derived therefrom, and I, the assignor, covenant as follows:

1. That the aforesaid life insurance policy is in full force and effect and that I have an interest to the extent of one-seventh in the proceeds thereof and that my respective share is free and clear of all liens, except that there is a loan of $1,943.00 heretofore granted, approved and advanced by the Insurance Company to the Protection Syndicate for a payment of premium on said policy and which this assignment is subject to.

17 2. That I have made no other transfer or assignment of my interest in said life insurance policy nor have I executed or delivered any power of attorney with respect to said policy.

3. That no proceedings in bankruptcy or insolvency has ever been instituted by or against me nor is any such proceeding now pending.

4. That I will, from time to time, at the expense of the assignee, make, execute, or cause to be made, or executed, such reasonable assurances, acts and instruments as may be requested by such assignee, for the more effectual confirmation of this assignment.

5. That I will forever warrant and defend the assignee's title to the aforesaid policy of life insurance.

In Witness Whereof, I have hereunto set my hand and seal, in the City of Middletown, New York, this 6th day of June, 1935.

(S.) MAX I. BRENWASSER. (L. S.)

In Presence of:
(S.) A. J. VERAEDI.

18 EXHIBIT G.

(Title Omitted.)

March 15, 1940.

The Court:

It is an interesting case, gentlemen, that runs back through the years. I have watched these witnesses as they have testified and tried to get at the proper weight to be given to what they said. That is what the Court would charge the jury it had the right to do and what it must do in the event there were contradictions or apparent contradictions in the testimony.

My estimate of them is that they were not learned nor adept at, or, in business affairs outside of their own special interests, and while one of them as been subject to rather careful scrutiny because of his apparent remissness of memory, I believe that they have told the truth. I think they made the advancements, and that one of
19 their number set up what he thought was a sufficiently efficient memorandum of what was coming in in the name of Middletown Tex Syndicate, but which memorandum is quite incomplete and insufficient to show the transactions as they really were.

I think large calls were made for money, and, their own resources being limited, they borrowed, which I think shows they stood well, and their testimony is that they paid those obligations. Those who testified, testified that they paid their portion of them. Those borrowed moneys

passed into this Middletown Company at first, in some instances, and, for the first year or two were partly used to pay premiums on this policy. These men testifying all the time, that they were paying these premiums, and, that worried me a great deal, after Mr. Bailey exhibited that book, but I think that that was Mr. Bates' method of keeping the payments that went to the policy, and that he was keeping it for those men. I cannot conceive of any other answer to it. Then the bookkeeping expert, or accountant, helps us out of that quandary somewhat by stating that the books were incomplete, and that they were made to balance by setting up, or, using them optionally, and that the notes, sometimes indicated in there, were paid by contributions, and things of that sort, so, that, even when they operated in that manner, it was an operation with and, for, their friend, Gordon, whom they had met in New York through a kinsman, whom he had there. They thought he was in Eldorado in Texas, that there was a chance to make money, and they relied a great deal upon his representations, and placed the money for him. He was not an unlearned man in that sort of business, evidently. He was somewhat of a promoter, not in any bad sense, doubtless, but he knew that it was necessary in order to get money, to have confidence in the minds of those from whom he was to get it, and that confidence he sought to continuously keep at par by saying, "I will protect you with a large insurance policy," and, "by these assignments, and these interests," and things of that sort, which in the crudeness of their commercial learning they sought to keep in somewhat of a memorandum in the manner I have indicated.

It would be repetition of history which we have learned in painful travail here for two, or, three days, to pass, in lengthy review, from the Middletown to the Protective Syndicate, and, then from the Protective Syndicate to McCoach as Trustee. There were these same ready and willing, and somewhat unsophisticated New Yorkers who

were furnishing the money for his ventures in Texas, both to him and to his concerns.

Later, even though they had been doing this without any worthwhile return, they, themselves, feeling the
21 limitations of necessity, responded to his limitations and gave him and his wife a one-eighth interest in this policy. Under that arrangement, more was given her than the one-eighth.

FINDINGS OF FACT.

I.

I find that this policy of insurance was a New York contract.

II.

That all of its changes, were made by the consent of those interested in it, and were made in the State of New Jersey and delivered in the State of New York afterward.

III.

I find that all of the premiums were paid by the present trustee and the men for whom he is trustee, save and except the sum of $270.00, which was paid by Gordon.

IV.

I find that at the time of the taking out of the policy and during its entire life, there were substantial advancements and credits made by these men to the insured, such advancements included not only the payment of premiums, but also loans, and advancements, largely in excess of the amount of money now on deposit in this Court.

22

V.

I find that one-eighth of this sum, plus $270.00 is the interest that belongs to Mrs. Gordon, and that she shall have that sum without deducting the $1100.00 which was advanced to her. The $270.00 to go to the Estate.

VI.

I find that at the time that that advancement was requested, she was a married woman and in that request her husband, so far as I have been able to discover, did not join, so as to make it a contract which the Court could recognize, as against her.

CONCLUSIONS OF LAW.

As a conclusion of law, I find that under the law of the State of New York neither an insurable interest, as we understand it, nor the relation of debtor and creditor, is necessary, but that even if it were necessary, those relations existed.

It follows from what I have said, of course, that the decree should go for the trustee, and those whom he represents, minus, of course, $270.00, and one-eighth of the amount I have mentioned here.

Mr. Bailey:

Will the Court give us some finding with reference to the gentlemen who hold the assignments?

The Court:

I think with reference to those men who hold assignments, that that is a matter to be litigated, if any-

23 one wishes to litigate it, between the one who assigned and the one who is the assignee—the as-

signor and assignee. Take one matter, Mr. Brenwasser here, he assigned, in his need for funds, for $500.00 to Nelson, I think it was, and the trustee McCoach will pay this fund to those who are entitled to receive it, and under the terms of the policy, he is guided in those payments by the names of the parties for whom he is trustee.

Mr. Bailey:

Will the Court make some character of finding as to whether or not those three gentlemen have an insurable interest, for the purpose of appeal?

The Court:

Well, there is no testimony, as I recall it, that either of the three assignees, paid any money to Gordon at any time, or, were interested with him in these investments, or, in his business.

I believe that covers it. Will you prepare a decree to be ok'd by Mr. Bailey, or, Mr. Shaeffer, saving such exceptions as they may wish.

24 EXHIBIT H.

Judgment.

(Title Omitted.)

On this the 18th day of March, A. D. 1940, came on to be heard the above styled and numbered cause, and came plaintiff J. Rob Griffin, Administrator with Will Annexed of the Estate of Robert D. Gordon, deceased, by his attorneys, and came N. Winkler, intervener, by his attorneys, and came Mrs. Fannie V. Gordon, intervener, in person and by her attorneys, and came the cross-defendants John D. McCoach, trustee, John D. McCoach, George B. Cody, Frederic W. Mead and Max I. Brenwasser in person, and came all of the cross-defendants by their attorneys.

All parties announced ready for trial, and thereupon hearing was held.

It appearing to the Court

(a) That the law and the facts are with the cross-defendant John D. McCoach as trustee, and with the other cross-defendants by and through John D. McCoach as trustee;

(b) That said cross-defendants agreed in open Court that out of any recovery awarded to them, one-eighth (1/8) thereof might be adjudged in favor of the intervener Mrs. Fannie V. Gordon;

(c) That in addition, intervener Mrs. Fannie V. Gordon should receive the sum of Two Hundred and Sixty Dollars ($260.00), by agreement in open Court; and

25 (d) That the cross-defendants take nothing as against the intervener Mrs. Fannie V. Gordon as to their claim of One Thousand Twenty-two Dollars ($1022.00).

It is therefore Ordered, Adjudged and Decreed

(a) That out of the funds on deposit with the Court, namely, Thirty-seven Thousand Four Hundred Sixty-two and 11/100 Dollars ($37,462.11), the Clerk shall retain the sum of Three Hundred Seventy-four and 62/100 Dollars (374.62);

(b) That out of the funds on deposit with the Court, Mrs. Fannie V. Gordon shall take and receive the sum of Four Thousand Eight Hundred Thirty-three and 43/100 Dollars ($4,833.43);

(c) That out of the funds on deposit with the Court, John D. McCoach as trustee shall take and receive, for the benefit of the other cross-defendants, the sum of Thirty-one Thousand Seven Hundred Fifty-four and 06/100 Dollars ($31,754.06);

(d) That cross-defendants take nothing as to their counter-claim against intervener Mrs. Fannie V. Gordon

in the amount of One Thousand Twenty-two Dollars ($1022.00);

(e) That the Clerk of the Court pay, and he is hereby directed to pay over and deliver the funds on deposit in the registry of the Court as hereinabove provided for;

(f) That plaintiff J. Rob Griffin, Administrator with Will Annexed of the Estate of Robert D. Gordon, deceased, and intervener N. Winkler, take and receive nothing;

(g) That all costs in this proceeding be taxed against J. Rob Griffin, Administrator with Will Annexed of the Estate of Robert D. Gordon, deceased, and intervener N. Winkler, jointly and severally, for which execution shall issue;

To all of which the substitute plaintiff, J. Rob Griffin, Administrator with Will Annexed of the Estate of Robert D. Gordon, deceased, and the intervener N. Winkler, duly Except, except as to Mrs. Fannie V. Gordon.

Done at Dallas, Texas, this 18th day of March, A. D. 1940.

WM. H. ATWELL,
U. S. District Judge.

26 Approved as to Form:

(Signed) BAILEY & SHAEFFER,
Attorneys for J. Rob Griffin, Administrator with Will Annexed for Estate of Robert D. Gordon, deceased.

(Signed) PAT H. CANDLER,
Attorney of intervener Fannie V. Gordon.

(Signed) CLARK & STEGALL,
Attorneys for intervener N. Winkler.

(Signed) CALLAWAY & REED,
Attorneys for cross-defendants John D. McCoach, et al.

27

EXHIBIT I.

Copy.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

J. Rob Griffin, Administrator with Will Annexed of the Estate of Robert D. Gordon, Deceased, Substitute Plaintiff,

vs. No. 88 Civil Action.

The Prudential Insurance Company of America, et al., Defendants.

Notice of Appeal.

Filed June 13, 1940.

To: John D. McCoach, Trustee, John D. McCoach, Max I. Brenwasser, George B. Cody, Nathan Schweiger, Alfred D. Leonard, Frederick W. Mead, Julius A. Bates, Harry G. Nelson, George E. Broadnack, LeRoy E. Leonard, and their attorneys of record, Callaway & Reed, Frank C. Brooks.

Mrs. Robert D. Gordon, and her attorney of record, Pat H. Candler.

N. Winkler, and his attorneys of record, Clark & Stegall:

You and each of you will take notice that the plaintiff, J. Rob Griffin, Administrator of the Estate of Robert D. Gordon, deceased, desires to take an appeal to the Circuit Court of Appeals for the Fifth Circuit sitting in New Orleans, from that certain judgment of the United States District Court for the Northern District of Texas rendered in favor of John D. McCoach, Trustee, on the 18th day of

March, A. D. 1940, wherein the said John D. Mc-
28 Coach was awarded the sum of Thirty One Thousand, Seven Hundred and Fifty Four Dollars and Six Cents ($31,754.06) being funds on deposit in the registry of said Court, to the use and benefit of the above named cross-defendants.

You are advised that the plaintiff herein desires to take an appeal from said judgment in favor of John D. McCoach, Trustee, for the use and benefit of the other parties above named.

BAILEY & SHAEFFER,
By C. J. SHAEFFER,
Attorneys for J. Rob Griffin, Administrator, Substitute Plaintiff.

29 EXHIBIT J.

Order.

(Title Omitted.)

On this the 19th day of July, A. D. 1940, came on to be heard the joint motion of the Appellant, J. Rob Griffin, Administrator, and the Appellees, John D. McCoach, et al.

And it is considered by the Court that same should be granted, and the time for filing the record in the Circuit Court of Appeals is enlarged from thirty days from this date, to-wit, the 18th day of August, 1940.

WM. H. ATWELL, Judge.

30 United States of America,
Northern District of Texas. ss.

I, GEORGE W. PARKER, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct copy of the Agreed Statement under Rule 76 in cause No. 88 Civil, J. Rob Griffin, Administrator with the Will Annexed of the estate of Robert D. Gordon, Deceased, plaintiff and The Prudential Insurance Company of America, et al. are defendants, together with Exhibits B and C, sent up pursuant to subdivision I, Rule 75, as shown by Judge's fiat, as fully as the same now remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said Court at Dallas, Texas, this the 2nd day of August, A. D. 1940.

GEORGE W. PARKER,
(Seal) Clerk, U. S. District Court,
Northern District of Texas,
By RAMELLE PAUL,
Deputy Clerk.

[fol. 31] That thereafter the following proceedings were had in said cause in the United States, Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission

Extract from the Minutes of November 7th, 1940

No. 9652

J. Rob Griffin, Administrator of the Estate of Robert D. Gordon, Deceased,

versus

John D. McCoach, Trustee, et al.

On this day this cause was called, and, after argument by C. J. Shaeffer, Esq., for appellant, and Frank C. Brooks, Esq., for appellees, was submitted to the Court.

[fol. 32] Opinion of the Court—Filed December 9, 1940

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 9652

J. Rob Griffin, Administrator of the Estate of Robert D. Gordon, Deceased, Appellant,

versus

John D. McCoach, Trustee, et al., Appellees

Appeal from the District Court of the United States for the Northern District of Texas

(December 9, 1940)

Before Sibley, Holmes, and McCord, Circuit Judges

Holmes, Circuit Judge:

This is a contest over the proceeds of an insurance policy issued on the life of Colonel Robert D. Gordon. John D. McCoach, as trustee for the men who organized the Middle-

town Tex Oil Syndicate and their assignees, claims the money as the beneficiary named in the policy; J. Rob Griffin, the administrator of the decedent's estate, claims a part of it in behalf of the heirs at law of Gordon. The insur-
[fol. 33] ance company, by interpleader, paid the amount due into the registry of the court, and has no interest in the controversy.

The issues presented on appeal can best be understood after a statement of the history of the policy. Colonel Gordon was a promoter during the beginning of the oil boom in Texas. He persuaded a group of seven men in the State of New York to furnish money for his ventures in Texas, both to him personally and to his promotional enterprises. To secure these advances, a term insurance policy for $50,000 was purchased by the group on the life of Gordon. They then organized the Middletown Tex Oil Syndicate for the purpose of paying the premiums on the policy, and the syndicate was named as beneficiary. In 1924, the Middletown Company dissolved, and its members formed a new association called Protection Syndicate, which continued to pay the premiums and to make advances to Gordon. The policy was changed, with the consent of Gordon, to designate the individual members of the syndicate as beneficiaries in the place of the Middletown Company.

Within seven years from the date the policy was issued, it was converted into a whole life policy. The right to convert was given by a provision in the original policy, but the form of the new policy was originated by the insurer after the original policy was issued. Both policies allowed the insured the right to change the beneficiary at any time, by written application accompanied with a surrender of the policy for endorsement, but the policy was continually held by the syndicate. All premiums were paid by the syndicate except one quarterly premium of $260 paid by Gordon.

In 1932, pursuant to an agreement between the insured and the beneficiaries, Gordon relinquished his right to dis-
[fol. 34] ability benefits and to change the beneficiary, in consideration of a payment to him by the syndicate of one-eighth of the proceeds of the policy received during his lifetime, and the payment of one-eighth of the proceeds to his wife after his death. The policy was changed to conform to this agreement by naming John D. McCoach as trustee beneficiary, and inserting an extension-of-rights

clause therein in his favor, thereby placing the contract under his absolute control.

In the years 1934, 1935, and 1936, three of the original members of the syndicate assigned their interest in the policy to persons who did not know Colonel Gordon, had advanced no money to him, were not related to him, and had not dealt with him in any way except to pay their pro-rata part of the premiums maturing on the policy between the dates of the assignment to each and the death of the insured. For some time before his death, Gordon was paid disability benefits, which payments were divided as provided by the agreement, one-eighth to Gordon and seven-eighths to the beneficiaries and the assignees.

The policy of insurance was applied for by Gordon in the State of New York, and it was delivered to him there from the home office of the insurer in New Jersey. The term policy was converted into a full life policy upon papers executed in New York, and that policy was delivered in New York. The change in the operation of the policy which placed the policy under the control of the trustee was effected by papers executed by Gordon in Texas and forwarded to and executed by each of the beneficiaries in the State of New York. These papers were then sent to the insurer in New Jersey, which returned the executed papers to the trustee in New York. The interpleader was filed in a United States District Court in Texas.

[fol. 35] The actual dispute lies between the administrator and the assignees of the beneficiaries. It is claimed that those who hold their interest by assignment, having had no dealings or relationship of any kind with the insured, had no insurable interest in Gordon's life and could not have a policy thereon. Two reasons are advanced to support this claim: that the agreement in 1932, under which McCoach, as trustee, became the beneficiary, was a Texas contract and was governed by the law of that state, which law limited recovery to those having an insurable interest; and, whether or not it was a Texas contract, the district court in which the interpleader was filed sat in Texas and was bound by the public policy of that state, which did not permit anyone, not acting in a representative capacity, to collect the proceeds of insurance policies on a life in which they had no insurable interest.

The policy of insurance was applied for in the State of New York, and was delivered in New York; and it is con-

ceded that it was governed by the laws of that state. The conversion of the term policy into a full life policy, the change of beneficiary, and the assignments of interests in the policy were made in accordance with clauses in the policy specifically providing therefor. These changes were made by the insurer in the discharge of obligations incurred in and outstanding by virtue of the original insurance contract. Such changes do not constitute new contracts, and do not result in changing the law applicable to the policy.[1]

Appellant concedes, and the court below found as a fact, that the original beneficiaries of the insurance each had insurable interests. If no assignments had been made prior to the maturity of the policy, the beneficiaries would have been entitled to seven-eighths of the proceeds thereof. This would have been true whether the New York law, [fol. 36] which required no insurable interest, or the law of Texas, which did require it, was applied. The question, then, is whether the assignments, made from beneficiaries entitled to receive the proceeds to assignees lacking an insurable interest, vest in the assignees the right to recover their pro-rata part of the insurance proceeds.

Under the terms of the policy, a New York contract, no restrictions were placed upon assignments relating to insurable interest. None was created by the laws of New York. Each of the assignments was executed and delivered in New York by residents of that state to other residents. They were New York contracts and valid under its laws. To apply the laws of Texas to the New York contracts would constitute an unwarranted extra-territorial control of contracts and regulation of business outside of Texas in disregard of the laws of New York; this is not changed by the trial of the suit in a court sitting in Texas. Overby v. Gordon, 177 U. S. 214, 222; New York Life Insurance Co. v. Head, 234 U. S. 149; Bond v. Hume, 243 U. S. 15; Ætna Life Insurance Co. v. Dunken, 266 U. S. 389, 399.

We are of the further opinion that it is immaterial, in so far as the decision of this case is concerned, whether the law of Texas or the law of New York be applied. The reasoning by which this conclusion is reached also disposes of the last two contentions of the appellant. In the present case, the insurer acknowledged liability and paid the money

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[1] Aetna Life Insurance Co. v. Dunken, 266 U. S. 389; Dannhauser v. Wallenstein, 169 N. Y. 199.

into court. This being so, not only does the objection of wagers disappear, but also the claimed principle of public policy.[2]

In those jurisdictions where the public policy is opposed to the grant of insurance proceeds to persons lacking insurable interest, the consistent purpose of the policy is to prevent wagering policies. The two contentions of appellant which advance the "public policy" and "gambling trans-[fol. 37] actions" claims must stand or fall together.[3] Since a fair and proper insurable interest was present when the policy was issued, and it was taken out in good faith, the purpose of the rule condemning wagers was sufficiently satisfied.[4] Modern policies of insurance are no longer mere indemnity contracts, but are property and have property values.[5]

The principle of public policy being out of the case, no one but the insurer was privileged to object for the lack of an insurable interest.[6] The insurer made no objection, and paid the full amount of its liability. The policy was valid when issued, and remained valid for more than ten years. A valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless the policy itself so provides.[7]

We conclude that the lack of an insurable interest in the assignees did not authorize a recovery of their interests in the policy by the administrator. The insurance proceeds

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[2] Grigsby v. Russell, 222 U. S. 149. Cf. Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616; Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591.

[3] Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457; Grigsby v. Russell, supra; 29 Am. Jur., Sec. 319.

[4] Connecticut Mutual Life Ins. Co. v. Schaefer, supra.

[5] Grigsby v. Russell, supra.

[6] Connecticut Mutual Life Ins. Co. v. Schaefer, supra; Wheeler v. Insurance Co., 101 U. S. 439; Grigsby v. Russell, supra; 29 Am. Jur. 291, 292.

[7] Connecticut Mutual Life Ins. Co. v. Schaefer, supra; Grigsby v. Russell, supra; Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96; Dalby v. Life Insurance Co., 15 C. B. 365.

were properly apportioned by the court below, and its judgment is

Affirmed.

[fol. 38] JUDGMENT

Extract from the Minutes of December 9th, 1940

No. 9652

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased,

versus

JOHN D. McCOACH, Trustee, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, J. Rob Griffin, Administrator of the Estate of Robert D. Gordon, deceased, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 37-44] Petition for rehearing covering 8 pages filed Dec. 30, 1940 omitted from this print. It was denied, and nothing more by order of Jan. 14, 1941

[fol. 45] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—January 14, 1941

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 46] In United States Circuit Court of Appeals

[Title omitted]

Motion to Stay Mandate—Filed January 16, 1941

Now comes the appellant in the above entitled and numbered cause, and respectfully shows the court that he tenders herewith a Motion for Rehearing directed to the decree of this court enterd on December 9, 1940, and has prayed therein for oral argument.

That after the judgment of the lower court became final, the appellant was unable to supersede the same, due to the absence of funds in his hands belonging to the decedent's estate, and that John D. McCoach, Trustee, the prevailing litigant withdrew from the Registry of the court all of the money in controversy and has distributed all except three-eighths claimed by the appellant. That in effect the judgment of the lower court has already been executed, and in [fol. 47] the event appellant prevails, his remedy will be by way of restitution.

Appellant further shows that in the event the court should adhere to its prior decision and overrule his Motion for Rehearing, he intends to apply to the Supreme Court of the United States for Writ of Certiorari directed to this Honorable Court and its record for revision and review.

Wherefore, he prays that in the event his Motion for Rehearing be overruled, that this court enter its order directing its Clerk to stay issuance of its mandate to the lower court pending his application for Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted, C. J. Shaeffer, Attorney for Appellant. Bailey & Shaeffer, Dallas, Texas, of Counsel.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 16th day of January, 1941.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 17, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following No. 741.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 755

J. ROB GRIFFIN, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ROBERT D. GORDON, DECEASED,
Petitioner,

vs.

JOHN D. McCOACH, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOS. W. BAILEY, JR.,
C. J. SHAEFFER,
Counsel for Petitioner.

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INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 755

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Petitioner,

vs.

JOHN D. McCOACH, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits his petition for a writ of certiorari, directed to the record of the proceedings in the Circuit Court of Appeals for the Fifth Circuit, to bring such record here for revision and review of the decision of that Court in the above entitled cause.

Summary Statement of the Matter Involved.

This action was brought in the United States District Court for the Northern District of Texas by the Estate of Robert D. Gordon, deceased, against the Prudential Insur-

ance Company of America, seeking to recover upon a policy of life insurance issued on the life of Robert D. Gordon (R. 1).

The insurance company answered filing a cross claim, in true form a bill of interpleader, and interpleaded John D. McCoach, Trustee, and sundry other parties, alleging that McCoach, Trustee, claimed as trustee for the owners of the policy by an assignment, and also was named as beneficiary therein. Having tendered the amount due under the policy into the Registry of the Court, it was discharged with its fees and costs, and the controversy over these funds was decided in favor of McCoach, the Trustee (R. 2).

The interpleader proceeding was brought pursuant to the Act of Congress authorizing insurance interpleaders. McCoach, Trustee, and the other cross-defendants were citizens of the State of New York. The plaintiff and the decedent were citizens of the State of Texas. The appeal to the Circuit Court was on an agreed statement under the provisions of Rule 76.

Gordon had originally had dealings with the Middletown Tex Oil Syndicate, which was composed of McCoach and the other cross-defendants (R. 3). That enterprise failed, and its only asset was a $50,000.00 policy upon the life of Gordon (R. 2-3). An association called "the Protection Syndicate" was then formed (R. 3) by the cross-defendants for the sole purpose of paying the premiums on the policy and receiving the money at the death of Gordon. McCoach was Trustee of that syndicate. The beneficiary was changed by Gordon to designate the Protective Syndicate and its individual members as beneficiaries, in place of the Middletown Tex Oil Syndicate.

The original policy was simply a term policy, with the privilege for conversion into an ordinary life policy at the expiration of seven years. At that time Gordon converted the term policy into a new policy, the beneficiaries desig-

nated being the individual members of the Protection Syndicate (R. 4). Each policy had provided by express terms that the insured, Gordon, reserved the right to change the beneficiary by a written application with surrender for endorsement. The converted policy provided for disability payments payable to Gordon. The policy remained in the possession of the Syndicate at all times, and it paid the premiums thereon, except one quarterly premium of $260.00 paid by Gordon.

Gordon was indebted to the members of the Syndicate for loans and advances. There was no claim that the policy had ever been pledged to secure these loans and advancements. On the contrary, the Syndicate recognized Gordon's right to change the beneficiary in the course of some negotiations in the year 1934 and made him a proposal, by United States mail sent from the State of New York to his home in Tyler, Texas (he having been throughout the entire period a citizen of the State of Texas), whereby the Syndicate offered to give Gordon a one-eighth interest in the policy, which had a disability benefit clause, in the case of total disability during his lifetime, and a one-eighth interest in the same to be paid at his death to his wife and to continue to pay the premiums, in consideration of his changing the beneficiary to McCoach, Trustee, and placing the policy under McCoach's exclusive control (R. 5).

This offer was accepted by Gordon by letter deposited in the United States mail in Tyler, Texas, and received by the Syndicate in the State of New York. The Syndicate then communicated with the Prudential Insurance Company at its Home Office in the State of New Jersey, the terms of the agreement with Gordon, and asked for the furnishing of appropriate forms. These forms were furnished by the insurer to the Syndicate, accompanied by a letter stating that upon receipt of the same properly executed, with the policy, the policy would be so endorsed. These forms were

then sent to Gordon in Texas from New York, were executed before a Notary Public in Texas by him and returned by mail to New York, where they were executed by the Syndicate, and then, accompanied by the policy, were sent to New Jersey, where the endorsement was made on the policy and it was returned to McCoach, Trustee (R. 6).

After this arrangement had been consummated, three of the original members of the Syndicate assigned their interest in the policy to persons who were total strangers to Colonel Gordon, who had advanced no money to him, were not related to him, and had no connection with him, except that they paid their pro rata share of the premiums thereafter maturing, until he became disabled in the year 1936 (R. 7 & 8). McCoach, Trustee, in this proceeding, claimed as trustee for the three assignees, and not for the original members of the Syndicate who had assigned to them (R. 9).

The case was submitted in the Fifth Circuit Court of Appeals on the 7th day of November, 1940, and decided on the 9th day of December, 1940, and the judgment of the lower court in favor of McCoach, Trustee affirmed. Motion for rehearing was filed on the 30th day of December, 1940, which motion was thereafter overruled by the Circuit Court of Appeals without written opinion, on the 14th day of January, 1941, and the mandate staid pending application to this court for Writ of Certiorari.

Questions Presented.

1. The first question is, in a proceeding such as this, in view of the decision of this Honorable Court in *Erie* v. *Tompkins*, 304 U. S. 64, and related cases, denying the existence of any general law of the United States, what law must guide the lower court in a bill of interpleader?

2. The next question is whether or not the law and public policy of Texas should not be applied by the United States

Court in an interpleader case such as this? Under Texas law, both as to its substantive law and the local rule of conflicts of law, the decree should have been in favor of Griffin, Administrator, because the law of Texas clothed McCoach as Trustee with a trust in favor of the insured's estate insofar as he claimed as trustee for *cestuis que trustent* who had no insurable interest; and he repudiated the only trust recognized under Texas law.

3. The second question above propounded concedes the truth of the legal proposition laid down by the Circuit Court of Appeals, that the law of New York governed the agreement of the parties. The record (R. 5 & 6), however, shows that the agreement whereunder McCoach, Trustee, was assigned the policy and named beneficiary was made in Texas, and for that reason he is governed by Texas law in his capacity as such. This is based upon the fact that the two contract rights which Gordon had in the policy at the time of the last agreement with the Syndicate were, first, the right to change the beneficiary, and second, the right to receive the disability payments during his life. This power to appoint and contractual right had a situs in his domicile, and the contract whereby he conferred them on McCoach was consummated by his posting a letter of acceptance in the United States mail in Texas.

Reasons Relied On for Allowance of the Writ.

(a) The Circuit Court of Appeals has decided a question of general importance, which is a question of substance involving the construction of a statute of the United States, which should be settled by this Court, and that is: Where a proceeding is instituted by an insurance company under provisions of 28 U. S. C. A., Sec. 41 (26), the Act of Congress of January 20, 1936, c. 13, Sec. 1, 49 Stat. 1096, what law should be applied by the court in which the interpleader is filed, in determining the controversy?

This involves inquiry as to whether or not the case of *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, holding that in such an instance the United States court would apply general law, has not been overruled by the decision in *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, which is applicable to bills in chancery; *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202; *Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. ——, 61 Sup. Ct. 176; *West, et al.* v. *American Telephone Co.*, 311 U. S. ——, 61 Sup. Ct. 179.

(b) The decision of the Circuit Court of Appeals is in conflict with the decision of the Seventh Circuit in the case of *Toomey* v. *Toomey*, 98 F. (2d) 736, holding that in a bill of interpleader the United States court is bound to apply the law of the State wherein it sits.

(c) The decision of the Circuit Court of Appeals does not give proper effect to the applicable decisions of this Court cited in (a) above, in that it cites and relies upon cases decided by this Court prior to the decisions above mentioned, which were either decisions interpreting the law of States other than the State of Texas, or decisions by this Court announcing the general law in accordance with the decision of *Swift* v. *Tyson*, 16 Pet. 1. These decisions, *Grigsby* v. *Russell*, 222 U. S. 149; *Phoenix Mutual Life Ins. Co.* v. *Bailey*, 13 Wall. 616; *Mutual Life Ins. Co.* v. *Armstrong*, 117 U. S. 591; *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Northwestern Life Ins. Co.* v. *Johnson*, 254 U. S. 296, announce rules in conflict with the law of Texas, which is reviewed by the Fifth Circuit in its decision in *Peoples Life* v. *Whiteside*, 94 F. (2d) 409, and exemplified by such decisions as *Cheeves* v. *Anders*, 87 Tex. 287, 28 S. W. 274, and *Wilke* v. *Finn*, 39 S. W. (2d) 836.

(d) The decision of the Circuit Court of Appeals is in conflict with the decision of the 9th Circuit in the case of

Sampson v. *Channell,* 110 F. (2d) 754; certiorari denied 310 U. S. 650, which holds that in a transitory cause of action the United States court must apply the rules of conflict of law as laid down and interpreted by the Supreme Court of the State wherein it sits; and under the Texas rule of conflicts of law, the assignments to the parties having no insurable interest would not have been recognized, because contrary to the public policy of the State.

(e) The Circuit Court of Appeals has failed to give proper effect to the decision of this Court in *Bond* v. *Hume,* 243 U. S. 15, which holds that a State of the Union may decline the enforcement of a contract made in another State, which violates the public policy of the State where enforcement is sought.

(f) The Circuit Court of Appeals has failed to give proper effect to the decision of this Court in *Union Trust* v. *Grossman,* 245 U. S. 413, in that that decision holds that the public policy of Texas inhibits enforcement of a contract made by a married woman, a citizen of Texas, in another State, contrary to the public policy of Texas, in the United States court sitting in Texas. And in the controversy here the insured was at all times a citizen of Texas.

(g) The Circuit Court of Appeals has so far departed from the accepted and usual judicial course of procedure as to call for the exercise of this Court's power of supervision, in that it has held contrary to the unanimous weight of authority that the assignment of a life insurance policy is governed by the law of the policy, even though it is a separate and independent contract made in the State of Texas, whereas the policy was governed by the State of New York.

(h) In like manner, the Circuit Court of Appeals has erroneously held that the power to appoint which is re-

served to the insured is governed by the law governing the policy, where the insured is domiciled in another State, and the only act performed by the insurer in connection with the right to change the beneficiary is the ministerial act of endorsement.

Conclusion.

The decision of the Circuit Court of Appeals erroneously construes the legal effect of the stipulated facts, both in determining the contractual rights of the parties and their sitii, and likewise, after so doing, applies rules drawn from decisions which have no application and which are, as applied by the Circuit Court of Appeals, in the very teeth of the decisions of this Court announcing that there is no general law of the United States.

WHEREFORE, PREMISES CONSIDERED, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit, in the above cause, and that the record be removed to this Court, and that the decree of the lower court be reversed.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 755

J. ROB GRIFFIN, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ROBERT D. GORDON, DECEASED,
Petitioner,

vs.

JOHN D. McCOACH, TRUSTEE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions of Courts Below.

There was no opinion filed in the District Court.

The opinion of the Circuit Court of Appeals (R. 31) is reported 116 F. (2d) 262. The motion for rehearing was overruled without opinion (R. 45). The decree of the Circuit Court of Appeals was rendered on December 9, 1940; petition for rehearing was filed December 30, 1940 (R. 37), and overruled January 14, 1941 (R. 45).

The jurisdiction of this Court is invoked and believed to be sustained under Sec. 240-a, Judicial Code (Sec. 347-a, Title 28, U. S. C. A.), as amended by Act of Congress of February 13, 1925.

Statement of Facts.

The facts have already been stated in a general fashion in the petition. Where the attention of the Court is directed to a specific fact, record reference will be made, or quotation taken from the record incorporated in the brief. The opinion of the Circuit Court is inaccurate in some of its statement of facts, and these inaccuracies will be noted through the brief.

Specifications of Error.

(Presented in the Motion for Rehearing R. 37-44.)

I.

The Circuit Court of Appeals erred in holding that the United States Court sitting in Texas could apply the laws of the State of New York in its decision contrary to the public policy of Texas, and thus permit the United States Court sitting in Texas to reach a conclusion directly at variance on the identical state of facts which would have been reached by the Texas court of concurrent jurisdiction.

II.

The Circuit Court of Appeals erred in applying the rules of law announced by the Supreme Court of the United States under its assumed power as expositor of general law to determine the rights of the parties in this case contrary to the Constitution of the United States as now interpreted by the Supreme Court.

III.

The Circuit Court of Appeals erred in holding that the law of Texas was identical with that announced by the decisions of the United States Supreme Court in the decisions cited, to the effect that where an insurable interest

is present when the policy is issued it is valid, and even if assigned is not within the rule against wagers, because the law of Texas as announced by the Supreme Court is to the effect that an insurance policy cannot be assigned or held by any person not having an insurable interest except in the capacity of trustee for the estate.

IV.

The Circuit Court of Appeals erred in holding that the law of Texas was similar to that announced by the decisions cited in its opinion to the effect that only an insurance company can contest a lack of insurable interest, and that where such company tenders the money into the Registry of the Court under a bill of interpleader, no one else can raise the question, because under the law of Texas a person named as beneficiary in a policy can only recover the proceeds if he have an insurable interest. If he have not, he may recover, but he recovers as trustee for the estate of the insured, and the estate of the insured can make itself a party to legal proceedings and assert its rights under the trust theory.

V.

The Circuit Court of Appeals erred in holding that the lower court was not bound to apply the rule of conflicts of law of the State of Texas in which it was sitting, and thereby avoid the force and effect of the law of Texas preventing recovery by a person having no insurable interest.

VI.

The Circuit Court of Appeals erred in its holding that the application of the law of Texas to McCoach, Trustee, would constitute an unwarranted extra-territorial control of contracts and regulations on business outside of Texas.

VII.

The Circuit Court of Appeals erred in not holding that the right to designate a beneficiary in an insurance policy was governed by the law of the domicile of the insured, and in holding that it was governed by the law of the place where the policy was delivered.

VIII.

The Circuit Court of Appeals erred in holding that the assignment of the policy to McCoach, Trustee, from Gordon was governed by the law of New Jersey, when in fact it was governed by the law of Texas.

IX.

The Circuit Court of Appeals erred in holding that McCoach, Trustee was not limited in his capacity as such by the law of Texas, and in consequence, permitting the recovery by him as Trustee for persons who had no insurable interest.

X.

The Circuit Court of Appeals erred in the following statement of law:

> "The conversion of the term policy into a full life policy, the change of beneficiary, and the assignments of interest in the policy, were made in accordance with clauses in the policy specifically providing therefor. These changes were made by the insurer in the discharge of obligations incurred in and outstanding by virtue of the original insurance contract. Such changes do not constitute new contracts, and do not result in changing the law applicable to the policy."

Firstly: In that while the conversion of the term policy into the full life time policy was admittedly pursuant to the terms of the original contract, and was effectuated in the State of New York, and on both grounds was governed by

the law of the State of New York, the assignment and change of beneficiary from Gordon to McCoach, Trustee was pursuant to the contract made in Texas and governed as an independent collateral agreement by the law of Texas.

Secondly: The insurance policy does not obligate the Insurance Company contractually with respect to the change of beneficiary or an assignment, its duties in connection therewith are purely ministerial, and for that reason neither the change of beneficiary nor the assignment is governed by the law which happens to govern the policy.

Point "A".

The courts of the United States are without constitutional power to apply to cases brought before them on account of diversity of citizenship of the parties substantive rules of law or equity different from those which would be applied by a State court of concurrent jurisdiction in deciding the same controversy if it were before it.

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general', be they commercial law or a part of the law of torts." (*Erie Railway Co.* v. *Tompkins*, 304 U. S. 64.)

Likewise, this limitation of power of the United States Court applies in those classes of actions formerly classified as equitable.

> "The subject is now to be governed, even in the absence of State statute, by decisions of the appropriate State court. The doctrine applies, though the question of construction arises—not in an action at law but in a suit in equity." (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202.)

The Circuit Court for the Fifth Circuit had held the contrary in *Cities Service Oil Company* v. *Dunlop*, 308 U. S.

208, a pure bill in equity. But this Court held that the local rule with reference to the burden of proof had to be applied.

This Court, in *Fidelity Union Trust Company* v. *Field*, 311 U. S. , 61 Sup. Ct. 176, *West* v. *American Telephone & Telegraph Co.*, 311 U. S. , 61 Sup. Ct. 179, announces the rule that the United States Court in ascertaining the State law is bound to follow the same method in finding it that the State court would use.

Point "B".

The United States Court must apply the law of the State where it sits, even to a transitory cause of action arising in another State, and even if the Circuit Court be correct in its finding that the law of New York or New Jersey governed the rights of the parties, the lower court sitting in Texas had to apply the law of Texas which includes the Texas rules with reference to conflicts of law. In *Sampson* v. *Channell*, 110 F. (2d) 754, certiorari denied 310 U. S. 650, the Ninth Circuit Court of Appeals recognized that the burden of proof imposed by the Maine law on the plaintiff in a negligence case was substantive within the rule of *Erie* v. *Tompkins*, *supra*. Nevertheless, they applied the Massachusetts rule, putting the burden on the defendant, because under Massachusetts law it was considered a procedural rule governed by *lex fori*. Judge Magruder stated:

> "If the Federal Court in Massachusetts on points of conflicts of law may disregard the law of Massachusetts as formulated by the Supreme Court of the judicial district, and take its own view 'as a matter of general law', then the ghost of the case of *Swift* v. *Tyson*, *supra*, still walks abroad, somewhat shrunken in size, yet capable of much mischief."
>
> "It is true that the rule applied in the Maine courts would not be the same as the rule applied in the Massachusetts courts. But this is a disparity that existed

prior to *Erie Railroad* v. *Tompkins, supra, and cannot* be corrected by the doctrine of that case. It is a disparity that exists because Massachusetts may constitutionally maintain a rule of conflict of laws to the effect that the incidence of burden of proof is a matter of 'procedure' to be governed by the law of the forum. *Levy* v. *Steiger, supra.*" Vide 128 A. L. R., page 405; vide *Waggaman* v. *General Finance Co.*, 116 F. (2d) 254.

The attention of the Court is called to the fact that a suit upon the policy in the nature of a suit at law was brought in the United States District Court by the plaintiff. The proceeding of the insurer was taken under the Act of Congress of January 20, 1936, c. 13, Sec. 1, 49. Stat. 1096 (U. S. C. A. Sec. 41, Subd. 26).

Acting under Rule 22 and Rule 13, of the Rules of Federal Procedure, the Insurance Company filed a proceeding as a cross claim of defense in the pending action at law. Thus, the insurer asserted a defense in a simple contract action pending in the District Court in Texas. The interpleader statute is but a phase of federal jurisdiction based upon diversity of citizenship, and in view of the decision of this Court that there is no general law, it would seem that the United States Court would have to apply the law of the state wherein it sits, having no other at its command.

Point "C".

Contests in the courts of Texas between an estate of an insured and the named beneficiary without insurable interest are frequent, and in each instance the fact that the Insurance Company interpleads and is discharged, has no effect upon the substantive rights of the parties under Texas law. In default of the named beneficiary showing an insurable interest, the proceeds in the registry of the court are invariably adjudged to the estate of the insured. (*Wilke* v. *Finn*, 39 S. W. (2d) 836) That opinion, besides illus-

trating the Texas doctrine, which is contrary to the view of the cases cited by the Circuit Court, quotes from *Cheeves* v. *Anders*, 87 Tex. 287, 28 S. W. 274, as follows:

> "It is against the public policy of this state to allow anyone who has no insurable interest to be the owner of a policy of insurance upon the life of a human being. (Price *v.* Knights of Honor, 68 Tex. 361, 4 S. W. 633; Schonfield *v.* Turner, 75 Tex. 329, 12 S. W. 626; 7 L. R. A. 189; Insurance Co. *v.* Hazlewood, 75 Tex. 351, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893.) In some states it is held that an element of wagering likewise enters into such contracts, which has led, as we believe, to inconsistencies in the decisions in some of the courts. Our court has placed the inhibition against such contracts upon the higher and sounder ground that the public, independent of the consent or concurrence of the parties, has an interest that no inducement shall be offered to one man to take the life of another. Making this the test in every phase of such cases, there can be no inconsistency in our decisions, and the public good will be better guarded.
>
> "Applying this salutary rule the conclusion has been reached by our court that such policy cannot be beneficially owned by any one not interested in the life insured, whether the policy be taken out in the first instance by the non-interested party, with or without the consent of the insured, or whether he acquired the policy by assignment from the person whose life is insured, or from another who had an insurable interest."

Further, in circumstances such as are presented by this record, the Texas rule is as follows:

> "When an insurance company has issued a policy upon the life of a person, payable to one who has no insurable interest in the life insured, or when a policy has been assigned to one having no such interest, the insurance company must nevertheless pay the full amount of the policy, if otherwise liable, because it has

so contracted; and it is no concern of the insurer who gets the proceeds, except to see that it is paid to the proper parties, under its agreement. It is simply required to perform its contract, and the law will dispose of the money according to the rights of the parties. (Ins. Co. *v.* Williams, 79 Tex. 637, 15 S. W. 478, and authorities cited.)"

The only decision on the subject in the State of Texas is *Manhattan Life Insurance Company* v. *Cohen*, 139 S. W. 51, writ of error denied by the Supreme Court, hence authority under Texas law finally dismissed for want of jurisdiction in the United States Supreme Court, 234 U. S. 123. The decision in that case is as follows:

"But the principle established by the weight of authority seems to be that an assignment of a policy of insurance, or the benefit thereunder, is a contract distinct and separate from the original contract of insurance, and is governed by the law of the place where the assignment was made, without reference to the place where the original contract was made, or to the law governing the contract. (2 Wharton, Conf. of Laws, 467g) See the entire section and the authorities cited in notes for the rule stated and its exceptions and limitations. See also, *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833, especially note 'h', page 858."

"We take it that the evidence establishes beyond dispute that the assignment of the policies here involved was made in Texas, and that it is governed by the rule stated. Hence the liability of the insurance company on the policies is determinable by the laws of this state and not of Georgia."

"Even if the assignment of the policies had been made in the State of Georgia, and it should be held valid under the laws of that state, it may be doubted whether, on account of its being contrary to the distinctive policy of the forum in which this suit was brought, such laws would be given effect by the courts

of Texas. 1 Whart. on Conflicts of Laws, Sec. 4a. For the same principle upon which the policy of this state is based, i.e., to protect the life of its citizens against the temptation of an assignee of a life policy who has no insurable interest in the life of the insured to shorten its duration, might be held to obtain in its forum, regardless of where the assignment was made. (*Barry* v. *Equit. Ins. Co.*, 59 N. Y. 587.)"

Point "D".

The State of New York declined to recognize the validity of an assignment made in Maryland by a citizen of New York in the courts of New York contrary to the policy of that state, as declared by a statute prohibiting the wife from assigning a policy of insurance on the life of her husband (*Barry* v. *Equitable Life Insurance of N. Y.*, 59 N. Y. 587), where the real controversy was between the parties to the assignment, though the insurer was a party.

The same result was reached in *Milhous* v. *Johnson*, 21 N. Y. S. R. 382, 4 N. Y. Supp. 199, where a New York court declined to recognize the validity of an assignment in the State of Ohio, and valid there, because the husband had not consented thereto. In this case, likewise, the insurer had paid the money into court and had been discharged.

It will be noticed that *Barry* v. *Equitable Life, supra,* is cited by the Texas court in *Manhattan Life Insurance Co.* v. *Cohen.* If New York be not bound to recognize the validity of assignments contrary to her policy made elsewhere, neither is Texas.

Point "E".

The power of one of the several states to condemn by legislative action contracts which may be perfectly permissible in all forty-seven others, and to refuse the enforcement of such contracts in its courts, has never been doubted by any decision of the United States Supreme Court. The

definition of "public policy" may be and often is as here laid down by the highest tribunal of the state. Public policy is the same, whether declared by the legislature or the court. It binds the citizens of that state and those dealing with them.

> "But elementary as is the rule of comity, it is equally rudimentary that an independent state under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law, where to do so would be repugnant to good morals, would lead to disturbance and disorganization of local municipal law, or in other words, violate the public policy of the state where the enforcement of the foreign contract is sought. It is moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not depend exclusively upon legislation, but may be the result of judicial construction and consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear conviction of the existence of the conditions justifying that course. And finally, it is certain that as it is peculiarly within the province of the lawmaking power to define public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under foreign law, comity will yield to the manifestations of the legislature's will and enforcement will not be permitted." (*Bond* v. *Hume*, 243 U. S. 15, and vide *Union Trust Company* v. *Grosman*, 245 U. S. 413.)

Point "F".

In order to show the erroneous conclusion of the Circuit Court to the effect that the change of beneficiary and assignment were made in accordance with the clauses providing

therefor, and hence did not constitute a new contract and are governed by the law governing the main policy, it is necessary to show certain provisions of these instruments.

The Record, page 5, shows without any ambiguity whatever that a contract was made by letter between Gordan and the Syndicate, and that Gordon accepted a written proposal addressed to him through the mail by posting a reply accepting it, in Texas.

The Record, page 6, likewise shows that after this contract was consummated, the Syndicate wrote the insurer inquiring how to record the same on the policy, and was furnished the forms called "Change of Beneficiary and Extension of Rights" clause. These are found in the Record, pages 15 and 16.

In a letter from the insurer (R. 6) to the Syndicate the former informs the latter that upon receipt of such forms duly executed, the company would endorse the changes. The provision of the policy with reference to the change of beneficiary is quoted (a) in the margin below, and (b) the provision of the policy pertaining to assignments, and (c) the provision of each of the forms.

> (a) "If the right to change the beneficiary has been reserved the insured may at any time while this policy is in force, by written notice to the Company at its Home office, change the beneficiary or beneficiaries under this policy, such change to be subject to the rights of any previous assignee, and to become effective only when a provision to that effect is endorsed on or attached to the policy by the Company, whereupon all rights of the former beneficiary or beneficiaries shall cease."
>
> (b) "Any assignment of this policy must be in writing, and the Company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment."

(c) "It is also agreed that this amendment shall not be operative until the policy shall have been endorsed or re-written in accordance herewith by the Company."

The District Court of the United States in New York, in an opinion by Judge Hand, in *Lovinger* v. *Garvan*, 270 Fed. 298, treated of a contract between the owner of a policy and a person contracting with such owner to change the beneficiary. He used this language:

"However, if the new beneficiary is a promisee for consideration of the person having the power, he has a right to compel the specific performance of the power, which is not determined by the death of the promisor. If the whole transaction were carried out in detail, he could compel the executors of the promisor to execute the power, which would speak as of the date of the contract. Equity will disregard the formal steps and treat the promisee as an already substituted beneficiary. (*Nally* v. *Nally*, 74 Ga. 669, 58 A. M. Rep. 458; *Schoenholz* v. *N. Y. Life Ins.* Co. (App. Div. 1st Dept.), 183 N. Y. Sup. 251. This does not, however, depend upon any vague theory of equity, nor is it based upon general motives of supposed justice. It rests upon the existence of an enforceable contract between the insured and the promisee, creating an obligation to use his reserved power. The case at bar, therefore, turns absolutely upon the existence of such an obligation."

This case was followed with approval by the District Court in *Kansas City Life Insurance Co.* v. *Jones*, 21 Fed. Sup. 159.

There are no cases save the opinion of the Circuit Court holding that an assignment of a life insurance policy is governed by the law of the state where the policy was issued when it is made in another state (2 Wharton, Conf. of Laws, 467g. Beale on The Conflict of Laws, Sec. 3481, page 1251).

The authorities are in agreement with the text writers and are collated in 63 L. R. A. 833, 23 L. R. A. (N. S.) 968, 52 L. R. A. (N. S.) 275.

It is the universal rule that the endorsement of a change of beneficiary is a purely ministerial act on the part of the insurer, which it cannot decline to perform. These authorities are collated in 78 A. L. R., page 970.

Gordon's interest in the policy and his right to change the beneficiary was recognized by the contract made by letter, (Bigelow on Estoppel, 6th Ed. 495), since the parties assumed such right to exist as a basis of the contract entered upon. His right to receive the disability payments was not in the beneficiary named at that time. The contractual rights—the right to receive the disability payments, and the right giving him the power to appoint—were choses in action having a situs at his domicile. (*Blodgett* v. *Silberman*, 277 U. S. 1, *Vogel* v. *New York Life*, 55 Fed. (2d) 205) No lien or special property was asserted by the Syndicate at any time with respect to the policy.

Our position is that the contract made by letter, having been consummated in Texas, and the Insurance Company having nothing more than a ministerial duty to perform, and having consented to endorse when it sent the forms to the Syndicate, which in turn sent them to Gordon, who executed them and deposited them in the mail in Texas addressed to the Syndicate, that the court in determining the locus of the transaction, must necessarily refer it to Texas, since prior to the execution of the forms there existed a valid enforceable agreement which had its existence in Texas, if it had any existence. The ministerial act of the company in endorsing certainly cannot be deemed to change the locus of this agreement from Texas to New Jersey.

No specific cases have been found where the Court of the United States or one of the states has determined the locus

of a power to appoint, where the Insurance Company is domiciled in one state and the insured in another.

However, under a policy of insurance governed by the law of Ohio, Justice Taft when sitting as the Circuit Judge, held in *Knight Templars & Masonic Mutual Aid* v. *Greene*, 79 Fed. 461, that a designation in the policy of the beneficiary, naming the beneficiary as the "heirs" of the insured, was governed by the law of the State of New York. In the opinion, he said:

> "In other words, the language is to be treated as of a testamentary character, and is to receive as nearly as possible the same construction as if used in a will under the same circumstances. The designation was made in New York by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were considering this language as a clause in a will, whether the money bequeathed was payable in New York or Ohio, there can be no doubt that the word 'heirs' would be construed under the New York law, because that was the domicile of the testator."

The right of a resident of the Province of Manitoba to revoke the designation of his wife as a beneficiary in a policy of insurance on his life and to divert the money elsewhere, is determinable according to the law of Manitoba, notwithstanding that the contract of insurance was made in the Province of Ontario, and was therefore governed by the law of Ontario. The court said that the question was not one of the construction of the policy or contract, but of the capacity of the insured to make a disposition of the benefit of the policy. (*National Trust Co.* v. *Hughes*, 14 Manitoba L. R. 41.)

The same result was reached with reference to a person domiciled in the Province of Ontario who changed the beneficiary in a policy issued and performable under the laws of the Province of Quebec. (*Toronto General Trusts*

Co. v. *Sewell*, 17 Ontario Reports 442, citing *Lee* v. *Abdy*, L. R. 17, Q. B. Division 309, 55 L. T. N. S. 297, 34 Week Rep. 653.) In this case the money had been paid into court by the Insurance Company, and the controversy was between the administrator of the insured and the person designated in the endorsement.

If we be correct that McCoach became trustee pursuant to a Texas contract, both he and the *cestuis que trustent* are governed by the law of Texas. The Supreme Court of the State of New York in *First National Bank* v. *National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, held in dealing with a trust created under the law of New Jersey, that the law of the state where the trust was created governed the trustee and the beneficiary. This being true, the Texas court was bound to construe this contract by the law of Texas, and to impose on the trustee and the beneficiaries thereof the limitation of that law.

The three assignees (R. 8) have already received over $1600.00 from the disability payments on this policy, and have been paid back through such payments more than they paid for their assignments, and more than they paid in as premiums before the insured became disabled.

The basis of the Circuit Court of Appeals' decision that the collateral contract was governed by the law of the main contract is the case of *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389. That decision does not support the conclusion, because there a term policy issued in Tennessee contained a stipulation that upon the sole option of the insured, he could convert the policy into a twenty-year pay life insurance policy by paying the difference in premiums. He made this election while living in Texas, and the converted policy was delivered to him here. Of course, the converted policy was issued pursuant to the old agreement, and there was no new contract made in Texas, but simply an exercise of a privilege under the old. That is far different from holding that the

law of the original policy governs the transfer of any rights thereunder, wherever they may be transferred.

Conclusion.

We submit that this case calls for the exercise by this Court of its supervisory power by granting a Writ of Certiorari and reversing the decision of the Circuit Court of Appeals.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 755

J. ROB GRIFFIN, Administrator with Will Annexed of the Estate of Robert D. Gordon, Deceased, *Petitioner*,

vs.

JOHN D. McCOACH, *Trustee*.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CARL B. CALLAWAY,
Attorney for Respondent.

FRANK C. BROOKS,
Of Counsel.

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INDEX

Table of Cases Cited

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I.

STATEMENT OF THE CASE

The following facts should be considered in connection with the summary statement of the case made by petitioner.

John D. McCoach, Trustee, was the named beneficiary of the policy of insurance, whose proceeds are in controversy. The defendants in the bill of interpleader filed by the Prudential Insurance Company in their answer asked that the proceeds of the policy be adjudged in favor of John D. McCoach, Trustee (R. 2), and the assignees of the defendants named asked that judgment be rendered in favor of John D. McCoach, Trustee. (R. 9.) The record does not show that McCoach, Trustee, claimed as trustee for the three assignees instead of the original members

of the syndicate, but only that in the event he recovered the proceeds, that he intended to pay over to each of the assignees their pro rata share. (R. 9.) This is not a suit filed by a citizen of one state against a citizen of another, but an interpleader suit (R. 2), arising out of an action filed by petitioner.

II.

ARGUMENT

Petitioner's six points fall into two classifications: (a) That the contract involved in this proceeding is a Texas contract; and (b) that regardless of where the contractual rights arose, that the trial court by virtue of sitting in Texas, must apply an alleged public policy of the State of Texas. They will be answered in that form.

THE CONTRACT IN CONTROVERSY IS NOT A TEXAS CONTRACT

There are three contracts or agreements considered in this controversy:

1. The principal contract and the one in controversy is the insurance policy issued by the Prudential Insurance Company of America, and this is conceded to be a New York contract. (This will hereafter be referred to as the insurance contract.)

2. The second contract which is considered is the agreement made between Robert D. Gordon and Alfred D. Leonard, Max I. Brenwasser, George B. Cody, Nathan Schweiger, John D. McCoach, Frederick W. Mead, and Julius A. Bates. This is the contract which appellant contends is a Texas contract. (This will hereafter be referred to as the agreement.)

3. The third contract is in reality three contracts, being the assignments from Max I. Brenwasser to Harry G. Nelson, from Julius A. Bates to George E. Bradnack, and from Alfred D. Leonard to his son, LeRoy E. Leonard. It is conceded that all of these assignments were made in the State of New York, and that all parties involved in the assignments were citizens of the State of New York. (These will hereafter be referred to as the assignments.)

The fund which is the subject of controversy in this cause was paid into the registry of the court by virtue of the insurance contract issued on the life of Robert D. Gordon. Any recovery of the fund must be based on the terms of that contract. Petitioner does not base any of his rights of recovery upon the terms of this contract.

His contention is that the agreement which was made by virtue of correspondence between Gordon in Texas and the parties in New York, was a contract made in Texas. This may or may not be true, but he is not claiming any right of recovery by virtue of the terms of this agreement. This is not an action to enforce the agreement but to determine the proper party to recover under the insurance contract.

Petitioner claims no right of recovery by virtue of the insurance contract nor by virtue of the agreement, but only by virtue of the assignments to which he was not a party. His contention, briefly, is that when the agreement was made, which is possibly governed by the laws of the State of Texas, in regard to the New York insurance contract, that this agreement so affected the original insurance contract that when subsequent to the agreement, assignments of

interest under the insurance contract were made, that these assignments would vest in him some interest.

Petitioner contends that the assignments would have been void if made in Texas, but he does not contend that anything was done within the State of Texas which is forbidden by or frowned upon by the legislative enactments of this State or the decisions of the State Courts. Every act complained of by petitioner is not only proper under the laws of the State where performed, but is sanctioned by the laws of that State. His contentions are based upon the assumption that it was necessary to adjudicate the issues of this case by virtue of the agreement, and not by virtue of the terms of the insurance contract. All of the funds in controversy were derived from the insurance contract, and this is admittedly a New York contract and governed by the laws of that State. All that the Circuit Court of Appeals has decided in this case is that where the rights of the parties in a controversy are fixed by virtue of a contract entered into under the laws of the State of New York, that the rights of the parties under that contract will be enforced in accordance with the laws of the State of New York.

There is no question involved in this proceeding as to the right of the parties to enforce the agreement which is contended to have been made in Texas. The only point in controversy is who is entitled to receive the proceeds of the insurance policy. The only thing that was ever done in Texas in regard to the insurance policy was that while the insured was living in the State of Texas, he agreed with the beneficiaries living in the State of New York that the beneficiary of the policy should be changed. A

change of beneficiary in a life insurance policy is not a new contract but only an amendment to the pre-existing contract, and does not change the situs of the original contract. *Pendleton v. Great Southern Life Insurance Co. (Sup. Ct. of Oklahoma), 273 Pac. 1007.* The agreement to change the beneficiary or to assign part of the proceeds of the property are separate and independent contracts and are governed by the laws of the State where made. *Manhattan Life Insurance Co. v. Cohen, 139 S. W. 51.* The fact that some separate independent contract may be governed by the laws of the State of Texas does not affect the fact that the principal insurance contract is governed by the laws of the State of New York.

The assignments made in New York are New York contracts and are valid. They are independent of the agreement claimed to be made in Texas and add nothing to that agreement.

Unless petitioner can show that the agreement in Texas makes both the insurance contract and the assignments subject to the law of the State of Texas his contentions fail. This he has not done.

THE ISSUES SHOULD BE DETERMINED BY THE LAW OF THE STATE OF NEW YORK

Petitioner has misinterpreted the decision of the Circuit Court and the rule laid down in *Erie Railway Company v. Tompkins, 304 U. S. 64.* The Courts of the United States are required to regard the laws of the several States as rules of decision in cases where they apply but this does not require the Courts of the United States to necessarily apply the laws of the States where they are sitting. Ordi-

narily this will be so because the cause of action arose in that jurisdiction, but it is not the rule set up to guide the Courts. As a general rule, a contract is governed by the law of the State where made, and the law of the State where made determines all questions in regard to the capacity to contract, the illegality of the contract, etc. *(Restatement of the Law of Conflict of Laws, Sec. 332, 347)* and the forum applies the law of the State where the contract is made. This is the Texas rule. This is also the Texas rule in regard to insurance contracts. *American National Insurance Co. v. Smith (writ of error refused), 13 S. W. (2d) 720-722.*

In *Seiders v. Merchants Life Association of the United States (Sup. Ct. of Texas), 93 Tex. 194,* the Court applied the law of the State of Missouri when it found that the insurance contract involved was a Missouri contract, regardless of the fact that the insured and beneficiary resided in Austin, Texas, and the company had a permit and was doing business in the State of Texas. In *New York Life Insurance Co. v. English (Sup. Ct. of Texas), 95 Tex. 391,* the Court applied the statutory law of the State of New York when it found that the policy was a New York contract, even though the policy was issued on the life of a citizen of the State of Texas.

As stated by this Court in the *Erie case,* the statute under consideration (Section 34, Federal Judiciary Act of September 24, 1789), attempts to promote uniformity of law throughout the United States. The position taken by the petitioner results in the very antithesis of this aim. If the Courts sitting in each of the other 47 States are to be forced or allowed to wholly disregard the law of

the State of New York dealing with an admitted New York contract, and apply the law of the States in which they are sitting, instead of there merely being disharmony between the decisions of a State Court and the Federal Court sitting in that State, there is a possibility of 47 different interpretations of the laws of the State of New York. Such a contention is neither within the spirit nor the letter of the *Erie case*. The Courts of the United States since the decision in the *Erie case* have consistently held that regardless of where the Court is sitting, when a contract is involved which arose and is governed by the laws of one State, that the law of the State which begot the contract will be applied. *Mutual Benefit, Health and Accident Association v. Bowman, 304 U. S. 549.*

Whenever policies of insurance are issued and delivered in certain States they become contracts of that State and are governed by the laws of that State. *Equitable Life Assurance Society of the United States v. Aaron, 108 Fed. (2d) 777, 778; Malloy v. New York Life Insurance Co. (writ of certiorari denied, 308 U. S. 572), 103 Fed. (2d) 439, 443.*

There is no disparity between what was done by the Circuit Court and what would have been done in the Courts of the State of Texas. The only contention that petitioner raises that would take the instant case out of the Texas Conflict of Law rule, as announced above, is on the basis of public policy.

Petitioner insists that certain actions in this cause are against the public policy of the State of Texas.

> "It is easy to say a thing is against public policy, but that does not make it so. Public policy is manifest-

ed by public acts, legislative and judicial, and not private opinions, however eminent." *(Giant-Powder Company v. Oregon Pacific Railway Co., 42 F. 470, 474.)*

There has been no statute enacted by the Legislature of the State of Texas which would prohibit a recovery by the respondent in this cause. The only thing which can be used to determine if there is a public policy, as stated by the petitioner, are the decisions of the Courts of the State of Texas.

Petitioner does not cite a single Texas case which holds that in a situation of this sort that the Texas Courts would not allow this respondent to recover as beneficiary under the policy. As shown above the general Texas rule is contrary to this contention.

Petitioner relies upon *Wilke v. Finn, 39 S. W. (2d) 836,* and *Cheeves v. Anders, 87 Tex. 287.* Those cases deal, however, only with Texas contracts, and do not discuss the point involved in this cause.

The other case relied upon is *Manhattan Life Ins. Co. v. Cohen, 139 S. W. 51,* and that case deals with the assignment of a policy of insurance. It recognizes that the assignment of a policy is separate and distinct from the original contract, and petitioner's only rights in this cause arise out of such a separate and independent contract which does not affect the principal contract, and in addition that case specifically decides that the contract there under consideration was a Texas contract.

It is apparent that no Texas Court has held as contended by the petitioner. There is no general public policy against the assignment of an interest in a life insurance policy, and, in fact, it has been held by this Court on sev-

eral occasions that such assignments are proper. *Midland National Bank of Minneapolis v. DeSoto Life Insurance Co., 277 U. S. 346, 350.* The effect of holding otherwise is pointed out in *Grigsby v. Russell, 222 U. S. 149.*

On other questions of public policy, the Courts of Texas have not held in conformity with petitioner's contention. The State of Texas has established a public policy by a statute which forbids a common carrier from placing in its bill of lading stipulations restricting its liability and declaring such stipulations null and void. In the early case of *Ryan and Company v. M. K. & T. Railway Co. (Sup. Ct. of Texas), 65 Tex. 13*, a contract of carriage had been made in Missouri by a resident of Texas. The goods were to be transported from Missouri to Texas. In the contract was a stipulation that the carrier was exempt from liability for loss or damage to the goods by destruction by fire. The Court, after deciding that the contract of carriage was a Missouri contract, even though it would have to be partially performed in Texas, applied the Missouri law, disregarding the Texas public policy.

There are numerous statutory enactments in the State of Texas protecting property of married women. These enactments are definite statements of public policy on this subject. In *Merrielles v. State Bank of Keokuk, 24 S. W. 564*, an attachment lien had been foreclosed upon the separate property of a married woman. In disposing of the case upon appeal the Court said (page 565, paragraph 4):

> "Appellant, in her fourth assignment, complains that 'the Court erred in submitting to the jury the laws of Iowa to create a liability against the separate real estate of a married woman situated in Texas, con-

> trary to the Constitution, laws and public policy of Texas, and in overruling the motion for a new trial based on this ground.' Without undertaking an extended discussion of this question, we express the conclusion that the Court correctly applied the law of Iowa—the 'lex loci contractus'—in the enforcement of the obligations in suit. This action, we think, was justified by the views of our Supreme Court in Ryan v. Railway Co., 65 Tex. 13, et seq."

In a similar case where the parties resided in Arizona, the law of the State of Arizona was applied and execution was allowed to be had upon the separate property of a married woman even though it was located in Texas. *Walker v. Goetz, 218 S. W. 569.* Thus in this proceeding we have the Court of the United States applying the identical rule that would have been applied by the Courts of the State of Texas, and, therefore, a different situation from that presented in *Sampson v. Channell, 110 Fed. (2d) 754.*

In connection with petitioner's contention about public policy, it should be borne in mind that in this cause the respondent was not attempting to enforce any rights as against the citizens of the State of Texas. An interpleader suit is nothing more than where two or more persons are suing a stakeholder, claiming the funds, and the stakeholder confesses liability for the amount sued for and refuses to pass upon the merits of the claim. The mere fact that the insurance company in the instant case has tendered the funds into Court does not make this a suit by the petitioner against the respondent or vice versa. Neither is asking for a judgment against the other, and no judgment could be rendered which would decree that one party must pay to the other so much money. The only judgment that

could be entered is to award one party the funds on deposit in the registry of the Court.

It has long been recognized that "the filing of this interpleader and payment into Court by the insurer does not affect the rights of the claimed beneficiaries." *(Kansas City Life Insurance Co. v. Jones, 21 Fed. Sup., 159, 160)* and that in interpleader situations, even though they involve claimants residing in different States, the decision in the interpleader suit should be the same whether the interpleader is filed in New York or Texas. There is no question as to what the decision in this case would have been if the interpleader suit had been filed in New York. *Steinback v. Diepenbrock, 37 N. Y. Sup. 279, 158 N. Y. 24, Warnock v. Davis, 104 U. S. 775.*

The Courts of the State of Texas have recognized that an interpleader suit is not the same as an ordinary cause of action, and that neither party is attempting to assert a right against the other, but only to establish a claim to a fund. *Sharp v. American National Insurance Co., 126 S. W. (2d) 50, 52.*

At most, the public policy of a State will only protect the citizens of that State and claims made against them. It will not reach out and interfere with the rights of persons of another State as against each other.

In this connection, the language of this Court in *Bond v. Hume, 243 U. S. 15*, is peculiarly applicable when it says:

> "It is obvious on the face of the pleadings, as stated in the certificate, that the contract the enforcement of which was sought was valid under the laws of the State of New York, the place where it was entered into and

> where it was executed, and this validity was not and could not be affected by the laws of the State of Texas, as, in the nature of things, such laws could have no extraterritorial operation."

As heretofore pointed out, petitioner's rights could only arise by virtue of contracts made in the State of New York, and his attempt to inflict upon those contracts the laws of the State of Texas is an attempt to give those laws extraterritorial effect.

It is misleading to say that the opinion of the Circuit Court holds that an assignment of a life insurance policy is governed by the laws of the State where the policy was issued, when this contract of assignment was made in another State. The Circuit Court has correctly held that an independent contract which incidentally affects a principal contract does not change the situs of the principal contract.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals has correctly decided the issues involved in this controversy in accordance with the applicable rules of law of both this Court and the Courts of the State of Texas, and there is no necessity for the granting of a writ of certiorari and a review of this case by this Honorable Court.

Respectfully submitted,

CARL B. CALLAWAY,
Attorney for Respondent.

FRANK C. BROOKS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 755.—October Term, 1940.

J. Rob Griffin, Administrator With Will Annexed of the Estate of Robert D. Gordon, Deceased, Petitioner,
vs.
John D. McCoach, Trustee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 2, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This is an action, begun in the United States District Court for the Northern District of Texas, by the personal representatives substituted for the heirs at law of Colonel Robert D. Gordon, who died a citizen and resident of Texas, against the Prudential Insurance Company of America to collect an insurance policy on the life of the decedent. The Company filed a bill of interpleader (49 Stat. 1096; 28 U. S. C. A. § 41(26)) making the respondent John D. McCoach, Trustee, and other alleged claimants parties and tendering the net amount due under the policy. The interpleader was allowed, the Company discharged from the litigation and the interests of all parties to the suit other than petitioner and respondent disposed of by the decree in a manner to which no one objects here. The controversy still to be decided is as to whether the estate or the Trustee is entitled to certain portions of the insurance. The circumstances giving rise to the issue follow.

Colonel Gordon, the insured, interested seven persons in Texas oil developments, including McCoach, the Trustee, in his individual capacity. They operated as a New York common law association called the Middleton Tex Oil Syndicate. The record here shows that "Prior to the issuing of the policy and thereafter, the members advanced considerable money to Gordon, and the premiums on the policy were paid by the members of the syndicate at Gordon's request, upon his agreement to repay the syndicate. Premiums were paid on the policy by the syndicate, in accordance with this agreement and were never repaid by Gordon." A term insurance policy was taken out by Gordon with the Syndicate named as beneficiary.

When the policy was issued, and at all times subsequent until his death, Gordon was a citizen of Texas. The Syndicate originally had physical possession of the policy. Two years after its issuance the Syndicate ceased operations. In 1924 due to financial reverses it ceased to do business and the members formed a new association called the Protection Syndicate. McCoach became and continues as Trustee of the Syndicate. It was organized "for the sole purpose" of paying the premiums on the policy and receiving and distributing the proceeds among the members. This it did until the insured's death. The beneficiary in the policy was changed to make the members of the Protection Syndicate the beneficiaries. By arrangement between the decedent and the members of the Protection Syndicate in 1934 a further change of beneficiaries was made by which, in consideration of the insured's release of the right to change beneficiaries on presentation of the policy for endorsement, hitherto retained, one-eighth of the disability proceeds of the policy were to be paid the insured and one-eighth of the death proceeds to his wife and the remaining seven-eighths to the Trustee for the members of the Protection Syndicate.

"The application for the policy was signed by Gordon in the State of New York, and forwarded to the home office of the Prudential Insurance Company in the State of New Jersey, and there acted upon, and the policy was delivered in the State of New York." The later arrangement by which Gordon and his wife became beneficiaries of one-eighth of the proceeds was consummated by certain forms furnished by the Prudential and "transmitted . . . from Middletown, N. Y., to Tyler, Texas, for Colonel Gordon's signature. They were there executed by Colonel Gordon before a notary public in Tyler, Texas, and returned to Middletown, N. Y., where they were executed by the parties residing there, from whence they were sent by Schweiger [an agent of the Prudential and a member of the Syndicate], with the policy, to the home office at Newark, N. J., and subsequently the forms were indorsed on the policy and it was returned directly from New Jersey to the beneficiaries in New York."

Thereafter three of the members of the Protection Syndicate separately assigned their interests in the policy to three individuals not previously interested in the transaction. These assignees paid their proportion of the premiums after the respective assignments.

The District Court decreed that Mrs. Gordon should receive her one-eighth and that the balance of the proceeds should be paid the Trustee for the benefit of the cross-defendants, members of the Protection Syndicate. The decree was based on a finding that the policy was a New York contract and that the subsequent changes were made in New Jersey and delivered in New York. Further the District Court concluded that the relation of debtor and creditor existed between the members of the Syndicate and their assignees upon the one hand and the insured upon the other and that therefore all the cestuis que trustent had an insurable interest in Colonel Gordon's life.

An appeal limited to the "correctness of the judgment of the trial court concerning the persons entitled to receive the assigned interests" was prosecuted on an agreed statement of the record under Rule 76 of the Rules of Civil Procedure. In the statement petitioner sets out two points now relied upon for reversal. First: That the assignment and change of beneficiary was governed by the law of Texas; that the Trustee claimed only under the assignment; that beneficiaries must have an insurable interest under Texas law and that the assignees had none. Hence the personal representative was entitled to recover their portions of the policy for the estate. *Wilke* v. *Finn*, 39 S. W. (2d) 836. Second: That if the whole transaction was governed by the law of another state than Texas, in which other state an insurable interest was not required, the United States District Court sitting in Texas was bound by the public policy of Texas which forbids persons without an insurable interest to collect in Texas, as beneficiaries, the proceeds of insurance policies.

The Circuit Court of Appeals affirmed. 116 F. (2d) 261. It held too that the policy was a New York policy, governed by the law of that state, and that as the subsequent changes were made pursuant to agreements contained in the original policy, they did not amount to new contracts or change the governing law. Cf. *Aetna Life Insurance Company* v. *Dunken*, 266 U. S. 389. The Court said:

"Under the terms of the policy, a New York contract, no restrictions were placed upon assignments relating to insurable interest. None was created by the laws of New York. Each of the assignments was executed and delivered in New York by residents of that state to other residents. They were New York contracts and valid under its laws. To apply the laws of Texas to the New York contracts would constitute an unwarranted extra-territorial control of

contracts and regulation of business outside of Texas in disregard of the laws of New York; this is not changed by the trial of the suit in a court sitting in Texas."

As to the violation of the claimed public policy of Texas against beneficiaries with non-insurable interests, the Court of Appeals decided that the rule could not be applied where, as here, a "fair and proper insurable interest" existed when the policy was issued. 116 F. (2d) 261, 264. Certiorari was sought and allowed, 312 U. S. —, on the ground among others of a conflict between the instant case and *Sampson* v. *Channell*, 110 F. (2d) 754, 759-62, where the First Circuit held that a United States court must apply the conflict of laws rules of the state where it sits.

For the reasons given in *Klaxon Company* v. *Stentor Electric Manufacturing Company*, No. 741 this term, decided today, we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit. In deciding that the changes made in the insurance contract left its governing law unaffected[1] and that the laws of Texas could not be applied to a foreign contract in Texas courts,[2] the federal courts were applying rules of law in a way which may or may not have been consistent with Texas decisions. Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary. The opinion does not rest its conclusions upon its appraisal of Texas law or Texas decisions but upon decisions of this Court inapplicable to this situation in the light of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 205.[3] The statement in the opinion "that it is immaterial, in so far as the decision of this case is concerned, whether the law of Texas or the law of New York be applied" we understand, from a reading of the whole opinion, to mean that while an insurable interest is required in Texas and not in New York, the lack of insurable interest is immaterial in this case even in Texas because "the insurer ac-

[1] Cf. Miller *v.* Campbell, 140 N. Y. 457.

[2] Cf. Union Trust Co. *v.* Grosman, 245 U. S. 412.

[3] Compare Grigsby *v.* Russell, 222 U. S. 149; Connecticut Mutual Life Ins. Co. *v.* Schaefer, 94 U. S. 457, relied upon below.

knowledged liability and paid the money into court. This being so, not only does the objection of wagers disappear, but also the claimed principle of public policy." But this is something to be decided according to Texas decisions to none of which the opinion refers. Cf. *Wilke* v. *Finn*, 39 S. W. (2d) 836; *Cheeves* v. *Anders*, 87 Texas 287. The decision must be reversed and remanded to the Circuit Court of Appeals for determination of the law of Texas as applied to the circumstances of this case.

In view of the holding quoted from the opinion below, page 3, *supra*, that to apply the laws of Texas to New York contracts when Texas citizens were parties would constitute an unwarranted extra-territorial control of contracts and regulation of business, it seems necessary to examine that position as it may be determined upon remand that these are foreign contracts and under Texas law unenforceable as contrary to the public policy of Texas because the assignees have no insurable interest. It would then be necessary to decide whether the courts of Texas could constitutionally apply Texas law to a foreign contract, valid where made, because such contract is contrary to the state's public policy.[4] If the Circuit Court of Appeals was correct in its view that the Constitution foreclosed application of such a Texas public policy to this case, the only question open on remand would be whether the contract sued upon was a Texas contract.

But the cases relied upon in the Court of Appeals to support its holding[5] do not in our opinion decide this question. *Overby* v. *Gordon* holds that the adjudication of a probate court of Georgia that the decedent was a resident of that state was a proceeding in rem and did not bind the courts of the District of Columbia in a suit to determine anew decedent's domicile. *New York Life Insurance Company* v. *Head* passed upon the application, by Missouri courts, of Missouri statutes providing for an extension of insurance on default of premium to an insurance contract assumed as of Missouri, though the insured at the time of issue and thereafter was a citizen of New Mexico. A New York loan agreement subsequent to the issuance of the policy between the insured and the Company, a citizen of New York, provided for extension after de-

[4] Cf. Sampson *v.* Channell, 110 F. (2d) 754, 759.

[5] Overby *v.* Gordon, 177 U. S. 214, 222; New York Life Insurance Co. *v.* Head, 234 U. S. 149; Bond *v.* Hume, 243 U. S. 15; Aetna Life Insurance Co. *v.* Dunken, 266 U. S. 389, 399.

fault which was contrary to the Missouri statutes. This Court held the Missouri statutes were ineffective because the New York loan agreement was beyond Missouri's jurisdiction. The point that Missouri might refuse enforcement because the agreement, valid in New York, was contrary to the public policy of the former was not discussed. In *Bond* v. *Hume,* a few years later, this Court reserved the principle here in question.[6] The *Aetna* case denied the constitutional power of the Texas courts to apply a Texas statute allowing a penalty and attorneys' fees against the company in a suit on an insurance contract made in a foreign jurisdiction with a person then a citizen of Tennessee because the "effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws under which penalties and attorney's fees are not recoverable." 266 U. S. at 399. The freedom from penalty and fee was deemed a part of the foreign contract and its effect on the public policy of Texas was not appraised.[7]

If upon examination of the Texas law it appears that the courts of Texas would refuse enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of its interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned, but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 110. It is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the en-

[6] 243 U. S. at 25: "And of course we must not be understood as deciding whether the mere existence of a state statute punishing one who in bad faith, and because of such bad faith, had made an agreement to deliver in a contract of sale which would be otherwise valid, could become the basis of a public policy preventing the enforcement in Texas of contracts for sale and delivery made in another State which were there valid although one of the parties might have made the agreement to deliver in bad faith."

[7] Before Erie Railroad *v.* Tompkins, 304 U. S. 64, this Court decided as a matter of general law that where time of notice is important the foreign law governs. Boseman *v.* Insurance Co., 301 U. S. 196, 202.

forcement of the foreign contract is sought." *Bond* v. *Hume*, 243 U. S. 15, 21. Applying that reasoning this Court affirmed the federal court in following Texas' decisions which refused to enforce a valid foreign contract of guarantyship against a married woman. *Union Trust Co.* v. *Grosman*, 245 U. S. 412. Likewise state courts have been upheld in refusing to lend their aid to enforce valid foreign contracts which required the doing of prohibited acts within the state of the forum. *Bothwell* v. *Buckbee, Mears Company*, 275 U. S. 274, 278. Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, 161; *Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143, 150. The rule was not applied where the parties to the contract acquired rights beyond the state's borders with no relation to anything done or to be done within the borders. *Home Insurance Company* v. *Dick*, 281 U. S. 397, 410.

In the *Head* case the foreign and local law differed as to the manner of extending insurance; in the *Aetna* case the difference arose from a local provision for attorney's fees and penalty; in the *Delta* case the time for notice varied in the two jurisdictions. In *New York Life Insurance Company* v. *Dodge*, 246 U. S. 357, it was said that a statute of the state of the forum, regulating the application of insurance reserves in case of default of premium was not effective, even while the insurance contract was a local contract and the insured a citizen of the state, to govern rights under a loan agreement made in a foreign jurisdiction. But these fall short of a public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers. It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement.

Reversed.

Mr. Justice FRANKFURTER concurs in the result.